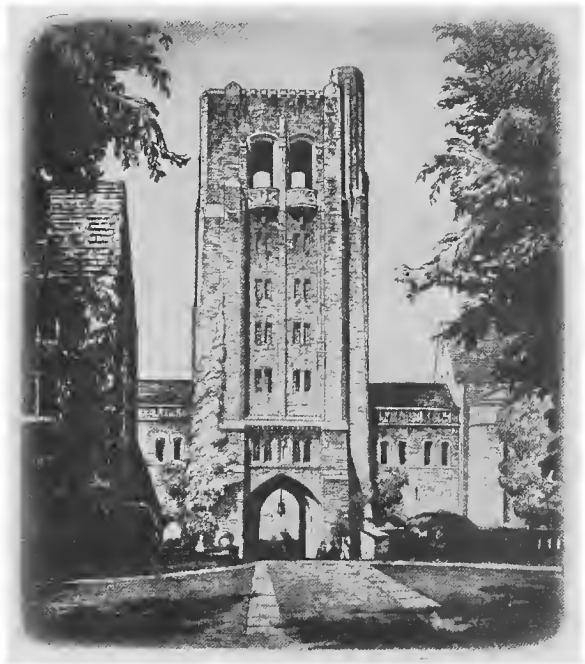




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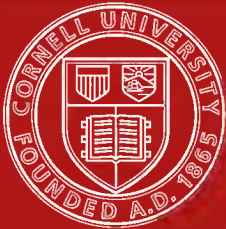
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Zoline  
on  
Appellate Jurisdiction and  
Procedure

In All Federal Courts  
and in all the  
Reviewing Courts of the State of New York  
With Federal Forms

By  
Elijah N. <sup>ATHANIEL</sup> Zoline  
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Federal Text Revised by  
Stephen A. Day  
Of the Chicago Bar

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New York  
1917

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ELIJAH N. ZOLINE  
1917



To

MY FRIEND

HONORABLE JAMES HAMILTON LEWIS  
UNITED STATES SENATOR OF THE STATE OF ILLINOIS

WITH WHOM, WHILE HE WAS CORPORATION COUNSEL FOR THE CITY OF CHICAGO AND  
COUNSEL FOR PRIVATE LITIGANTS, I ENGAGED AS HIS CO-LABORER,  
WHICH MADE IT POSSIBLE FOR ME TO EXPOUND THE  
LAW TO WHICH THIS BOOK IS ADDRESSED





## PREFACE

OF the different branches of the law comprising the jurisprudence of our country, the subject of federal appellate jurisdiction and procedure is apparently least understood. This is evidenced by the large number of appeals and writs of error dismissed for want of jurisdiction or for failure to comply with the law governing the procedure in certain cases.

It must be conceded that questions of jurisdiction, notably the jurisdiction of the Supreme Court of the United States, are not always free from doubt and can be definitely answered only by the Court itself; but in the majority of cases the law is clear; the jurisdiction and procedure of the different reviewing courts are well defined. What then is the cause of so many dismissals? To this question many answers may be given, but the author begs to suggest two reasons:

First—The subject of appellate jurisdiction and procedure in the Courts of the United States is, as a general rule, not taught in the law schools. In some schools instruction is given on federal jurisdiction generally, but nowhere, as far as the author is advised, is the subject taught as a separate and distinct branch of the law.

Second—The law relating to federal appellate jurisdiction and procedure has undergone many changes, namely, by the passage of the Federal Judicial Code in 1910; by the promulgation of the new Federal Equity rules in 1912; by various amendments to the Judicial Code in 1913 and 1915, and again as recently as September 1916. In addition are the many rules of court and the decisions construing both the statutes and the rules. No little uncertainty and confusion have resulted.

The foregoing statement explains the need of a book brought down to date, treating the subject of federal appellate jurisdiction and procedure as a separate and distinct branch of the law.

## PREFACE

This book is not a digest, and no claim is made that it covers all the decisions upon the subjects treated. However, an inspection of the matter discussed and the authorities cited in support of the same will show that they are sufficient for all practical purposes. All obsolete statutes, rules, and decisions have been disregarded. Only, the latest decisions, statutes, and rules are given, except where no change in the law has taken place.

The author has endeavored to arrange each topic in logical and convenient order, and the practitioner will find the various statutes, rules, and decisions, ordinarily scattered among many books, grouped together in this work. Hope is entertained that as a result of this plan both time and labor will be saved, and the possibility of error arising from a reliance upon an obsolete law will be reduced to a minimum.

This book was written by an active and experienced federal practitioner for practitioners.

The trouble with many cases brought for review in the Supreme Court of the United States is that the federal question is an after-thought and is, so to speak, injected in the record at the eleventh hour. In this book the author has attempted in many ways to demonstrate how and when to raise a federal question; what constitutes a federal question; within what time and in what court a federal judgment or decree or a decision of the highest court of the state may be reviewed. Whether a substantial federal question in fact exists often depends upon the application of principles of substantive law—both constitutional and statutory, and, for this reason, the author here and there deemed it necessary to enlarge upon the substantive law in so far as it is related to the subject of federal jurisdiction. This feature of the work, he trusts, will be helpful to the practitioner.

As to the second part of the book, dealing with the jurisdiction and procedure of all reviewing courts of the State of New York, little need be said. As compared with other states the law of New York is simple, yet, notwithstanding its simplicity, many cases are dismissed for want of jurisdiction by the Court of Appeals because of the limitations imposed upon that Court both by the Constitution and the Code. Many rules of practice are frequently misunderstood and, as in the case of the federal law, the appellate jurisdiction and procedure of the

## PREFACE

State of New York has also in recent years undergone many changes by statute, notably in the year 1917. The plan and arrangement adopted for the treatment of the various subjects in the first part of the book has been followed. Only the law as it is *now* is given. The practitioner of the State of New York will have before him, as a ready reference book, all the law bearing on the subject needed for practical purposes.

The author is under great obligation to the Hon. Charles Merrill Hough, U. S. Circuit Judge in and for the Second Circuit, and to the Hon. John W. Davis, Solicitor General of the United States, both of whom have read the manuscript and made valuable suggestions which are incorporated in this book.

The author is also under obligation to the Hon. James D. Maher, Clerk of the U. S. Supreme Court, and the Hon. William R. Stansbury, his assistant; to the Hon. William Parkin, Clerk of the U. S. Circuit Court of Appeals for the Second Circuit, and the Hon. Dimon E. Roberts, his assistant; to the Hon. Edward M. Holloway, Clerk of the U. S. Circuit Court of Appeals for the Seventh Circuit, for the many courtesies extended to him by them. Many of their suggestions made it possible to give to the practitioner authentic information relating to the procedure in their respective courts.

ELIJAH N. ZOLINE.

NEW YORK, N. Y.  
*October 15, 1917*



## INTRODUCTORY REMARKS BY MR. DAY

In the course of time and the further development of the United States, the Federal Jurisdiction has been gradually extended and this tendency will be more in evidence in the future.

The present need is for a reliable treatise on the practical side of Federal Appellate Jurisdiction and Procedure, abreast of the decisions and statutory amendments to the practice acts.

The task of revision has been one of pleasure, because the work of the author has been exceedingly well done and with commendable accuracy.

STEPHEN A. DAY.

CHICAGO, ILLINOIS,  
*September 15, 1917.*



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**PART I.**  
**APPEAL AND ERROR IN THE FEDERAL COURTS.**



## CHAPTER I.

## Fundamentals of Appeal and Error—General Observations.

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## § 1. General definition of appeal.

An appeal is a civil law process, and removes a cause entirely, subjecting the law and the fact to a review and re-trial.

## § 2. General definition of writ of error.

A writ of error is a common law process, and removes for re-examination nothing but the law.<sup>1</sup>

<sup>1</sup> *Suydam v. Williamson*, 20, How (U. S.) 427, 15 L. Ed. 978; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Hudson v. Parker*, 156 U. S. 286, 39 L. Ed. 427, 15 Sup. Ct. Rep. 450.

**§ 3. The distinction maintained.**

The statutes of the United States speak of appeals and writs of error, but do not confound them. Appeals and writs of error are purely statutory. None of the courts have any inherent jurisdiction, their jurisdiction depending wholly upon statutory provisions.<sup>1</sup>

**§ 4. Constitutional provision.**

When this nation was created, it became necessary to its existence to lodge its judicial power in national courts. This found expression in the Constitution of the United States, which provides that, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."<sup>2</sup> . . .

**§ 5. Supreme Court only court created by Constitution.**

The powers of the general government are made up of concessions from the people of the several states. The judicial power of the United States is a constituent part of these concessions. From the language of the Constitution (Sect. 1, Art. III), it is clear that the Supreme Court is the only court of the United States created by the Constitution and possessing jurisdiction and power derived directly and immediately from that instrument and of which Congress cannot deprive it.<sup>3</sup>

**§ 6. Power of Congress over inferior courts.**

The jurisdiction and power of all inferior courts of the United States is entirely derived from and dependent upon some Act of Congress.<sup>4</sup>

**§ 7. Congress fixes limit of jurisdiction.**

The Constitution lodged the whole judicial power in the

<sup>1</sup> U. S. v. Goodwin, 7 Cranch, 110, 3 L. Ed. 284; Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. Rep. 452, 38 L. Ed. 305; Ex parte Crane, 5 Peters 205, 8 L. Ed. 98 (diss. op.)

<sup>2</sup> Sect. 1, Art. III., of the Constitution of U. S.

<sup>3</sup> U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; Stevenson v. Fain, 195 U. S. 167, 49 L. Ed. 142, 25 Sup. Ct. Rep. 6, 49.

<sup>4</sup> In re Burns 136 U. S. 609, 34 L. Ed. 508; Sheldon v. Sill, 8 How. 449, 12 L. Ed. 1151; Turner v. Bank of North Am., 4 Dall. 8, 1 L. Ed. 718; McIntire v. Wood, 7 Cranch, 504, 506, 3 L. Ed. 420; Stevenson v. Fain, 195 U. S. 165, 49 L. Ed. 142, 25 Sup. Ct. Rep. 6, 49.

national courts, but left to Congress to prescribe the limit of the jurisdiction of these courts.<sup>1</sup>

(a) The power of Congress to create and abolish inferior courts is fully established.<sup>2</sup>

(b) Since the adoption of the Constitution, Congress did from time to time create and abolish Federal inferior courts, and on March 3, 1911, it passed a new Federal Judicial Code, which took effect on January 1, 1912, and has since been amended in many particulars.

### § 8. The new Federal Judicial Code.

The new Code abolished the U. S. Circuit Courts and retained the District Courts. The District Courts thus became vested with all the jurisdiction and power theretofore possessed by the Circuit Courts. Such parts of the new Code and the recent amendments as are within the scope of this work will be found in this book, with such amplification as the author deems necessary for a proper consideration of the subject.

### § 9. Jurisdiction the fundamental question—Appellate jurisdiction—When retained.

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of the Appellate Court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relations of the parties to it.<sup>3</sup>

<sup>1</sup> *Decatur v. Paulding*, 14 Peters 497, 599, Appx., 10 L. Ed. 559, 609; *Stevenson v. Fain*, 195 U. S. 167, 49 L. Ed. 142, 25 Sup. Ct. Rep. 6, 49.

<sup>2</sup> *Downes v. Bidwell*, 182 U. S. 289, 21 Sup. Ct. Rep. 770, 45 L. Ed. 1107; *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851.

<sup>3</sup> *Toledo Newspaper Co. v. United States*, 237 Fed. 986 (C. C. A. 6th Cir.); *Morris v. Gilmer*, 129 U. S. 315-326, 9 Sup. Ct. Rep. 89, 92, 32 L. Ed. 690; *Louisville & N. R. R. Co. v. Mottley*, 211 U. S. 149, 53 L. Ed. 127; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. Rep. 650, 46 L. Ed. 954; *Huntington v. Laidley*, 176 U. S. 668, 20 Sup. Ct. Rep. 526, 44 L. Ed. 630; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 454, 20 Sup. Ct. Rep. 690, 44 L. Ed. 842; *Continental National Bank v. Buford*, 191 U. S. 119, 120, 48 L. Ed. 119; *Gilbert v. David*, 235 U. S. 561, 59 L. Ed. 360, 35 Sup. Ct. Rep. 164; *Farmers Oil & Guam Co. v. Duckworth Co.*, 217 Fed. 362; *Miller & Lux, Incorporated, v. East Side Canal & Irrigation Co.*, 211 U. S. 293, 53 L. Ed. 189; *Mansfield, etc., R. R. Co. v. Swan*, 111 U. S. 379,

When an appellate tribunal properly acquires jurisdiction over a case it must retain it and give final judgment regardless of any change of circumstances which may have taken place subsequent to the appeal.<sup>1</sup>

### § 10. Jurisdiction defined.

Jurisdiction is the power to hear and determine a cause.<sup>2</sup>

Jurisdiction is the right to put the wheels of justice in motion, and to proceed to the final determination of the cause upon the pleadings and evidence.<sup>3</sup>

It is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.<sup>4</sup>

### § 11. Essentials of Appellate jurisdiction.

The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted; and does not create that cause.<sup>5</sup>

Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third,

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<sup>1</sup> 4 Sup. Ct. Rep. 510, 28 L. Ed. 462; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 24 Sup. Ct. Rep. 63, 48 L. Ed. 140.

<sup>2</sup> *Wilson v. United States*, 232 U. S. 563, 58 L. Ed. 728, 34 Sup. Ct. Rep. 563; *Williamson v. United States*, 207 U. S. 425, 52 L. Ed. 278, 28 Sup. Ct. Rep. 163; *Burton v. United States*, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rep. 243; *Homer v. United States*, 143 U. S. 570, 36 L. Ed. 266, 12 Sup. Ct. Rep. 522.

<sup>3</sup> *Lamar v. U. S.*, 240 U. S., 60, 36 Sup. Ct. Rep. 225, 60 L. Ed. 526; *Hine v. Morse*, 218 U. S. 493, 54 L. Ed. 1123; *Brougham v. Oceanic Navigation Co.* 205 Fed. 853; *United States v. Arredondo*, 31 U. S. (6 Peters) 691, 709; *Rhode Island v. Massachusetts*, 37 U. S. (12 Peters) 718; *Grignon v. Astor*, 43 U. S. (2 Howard) 338.

<sup>4</sup> *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. Rep. 251, 45 L. Ed. 410.

<sup>5</sup> *Lamar v. U. S.*, 240 U. S. 60, 36 Sup. Ct. Rep. 255, 60 L. Ed. 526; *Rhode Island v. Massachusetts*, 37 U. S. (12 Peters) 657, 9 L. Ed. 1233; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768.

<sup>6</sup> *Ex parte Watkins*, 32 U. S. (8 Peters), 568; *Ex parte Virginia*, 100 U. S. 337, 25 L. Ed. 676; *Cohen v. Virginia*, 6 Wheaton 264, 5 L. ed. 357.

the point decided must be in substance and effect, within the issue.<sup>1</sup>

### § 12. Scope of jurisdiction generally: nature of judgment.

The power to hear and determine a cause is not limited to making correct decisions but includes the power to decide wrongly as well as rightly.<sup>2</sup> As applied to a particular controversy it is the power to hear and determine the subject-matter of that controversy. And by this is meant the power to hear and determine causes of the class to which the particular controversy belongs. It is the power to act upon the general question in its relation to the facts presented, to adjudge whether such facts call for the exercise of the abstract power.<sup>3</sup>

### § 13. Jurisdiction not affected by erroneous ruling.

The merits as distinguished from jurisdiction relate to the duty of the court in a given case, and errors in respect thereof, whether by mistake of law or of fact, do not invalidate its action. Its action cannot be collaterally impeached, but stands everywhere until vacated according to the prescribed procedure. The jurisdictional character of a question is not determined by its importance. Thus, whether a suit in a federal court against a state official is a suit against the state contrary to the eleventh amendment is not jurisdictional, but relates to the merits.<sup>4</sup> And even where a statute says certain causes of action "shall not be enforced by any court," the prohibition may not go to the jurisdiction.<sup>5</sup>

### § 14. Authority to consider jurisdiction incident to general power.

A court must as an incident to its general power to administer justice have authority to consider its own right to hear a cause. But the mere decision by a court that it has such right when it

<sup>1</sup> Reynolds v. Stockton, 140 U. S. 254, 268; 11 Sup. Ct. Rep. 773, 35 L. Ed. 464; In re Casey, 195 Fed. 322, 328.

<sup>2</sup> Lamar v. U. S., 240 U. S. 60, 36 Sup. Ct. Rep. 255, 60 L. Ed. 526; Ex parte Moran, 144 Fed. 594, 604; In re First Nat. Bank, 152 Fed. 64, 69; Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857, 859.

<sup>3</sup> Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857, 859 (C. C. A.); Old Wayne v. McDonough, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236.

<sup>4</sup> Scully v. Bird, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899.

<sup>5</sup> Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039.

does not exist does not give it authority. A court by moving in a cause assumes authority but the assumption does not confer it.<sup>1</sup>

### § 15. Judgment without notice absolutely void.

A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the laws of its organization, over the subject-matter.<sup>2</sup>

### § 16. Jurisdiction over subject-matter conferred by authority.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.<sup>3</sup>

### § 17. Jurisdiction over person obtained by process.

Jurisdiction over the person is obtained by service of process, or by voluntary appearance of the party in the progress of the cause.<sup>4</sup> Where service of process was obtained by fraud, the Court was without jurisdiction, as held in the recent case of *Blandin v. Ostrander*, decided by C. C. A. Second Circuit on January 9, 1917.

### § 18. Process in rem.

Jurisdiction against the person is acquired only by service of process; but where the claim is against property within the juris-

<sup>1</sup> *Brougham v. Oceanic Navigation Co.*, 205 Fed. 857, 859 (C. C. A.).

<sup>2</sup> *Old Wayne v. McDonough*, 204 U. S. 9, 27 Sup. Ct. Rep. 236, 58, 51 L. Ed. 345; *Windsor v. McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914; *Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct. Rep. 841; *Simon v. Craft*, 182 U. S. 427, 45 L. Ed. 1165, 21 Sup. Ct. Rep. 836.

<sup>3</sup> *U. S. v. New York Co.*, 216 Fed. 61 (C.C.A. 2d Cir.); *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308, 316, 19 L. Ed. 931; *Pac. Coast Co. v. Bankcroft Co.* 94 Fed. 185.

<sup>4</sup> *Pennoyer v. Neff*, 95 U. S. 732, 24 L. Ed. 565; *Cooper v. Reynolds*, supra; *Kendall v. U. S.* 12 Peters 524, 9 L. Ed. 1181; *Harris v. Hardeman*, 14 How. 334; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 699, 13 Sup. Ct. Rep. 859.



diction of the court, personal service of the owner or possessor is not required.<sup>1</sup>

**§ 19. Jurisdiction over subject-matter cannot be conferred by consent.**

Silence of counsel does not waive the question of jurisdiction, nor would the express consent of the parties give the court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and to be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with jurisdiction which it does not by law possess, over the subject-matter.<sup>2</sup>

**§ 20. Organic power of the Court. Jurisdiction must be retained.**

Within its limitations respecting subject-matter, a Federal court is a court of general jurisdiction; and if the organic power to hear the controversy exists, it is immaterial how or when the parties get into court. Jurisdiction, having once attached, must be retained. It must not be lost pending the cause.<sup>3</sup>

**§ 21. Certain facts jurisdictional.**

There is in every proceeding of a judicial nature one or more facts which are strictly jurisdictional, and the existence of which is necessary to the validity of the proceedings, and without which the action of the court or judge is a nullity, as the pendency of the action and service of process on defendant, a subject-matter within the power of the particular court or judge to hear and determine as shown by pleadings or a petition.<sup>4</sup>

<sup>1</sup> Louisville & R. R. Co. v. Schmidt, 177 U. S. 230, 44 L. Ed. 747, 20 Sup. Ct. Rep. 620; Boswell v. Otis, U. S. (9 How.) 336, 13 L. Ed. 164; Pennoyer v. Neff, 95 U. S. 714, 25 L. Ed. 565; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 209, 13 Sup. Ct. Rep. 859, 37 L. Ed. 699.

<sup>2</sup> Minnesota v. Hitchcock, 185 U. S. 373, 382, 22 Sup. Ct. Rep. 650, 46 L. Ed. 954.

<sup>3</sup> Toledo, St. L. & W. R. Co. v. Perenchio, 205 Fed. 472, 476 (C. C. A.)

<sup>4</sup> Noble v. Union River Logging R., 147 U. S. 165, 173, 13 Sup. Ct. Rep. 271, 37 L. Ed. 123; In re Casey, 195 Fed. 322, 328.

**§ 22. Quasi jurisdictional facts.**

There is a class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Instances of these are the allegations and proof of the requisite of diversity of citizenship, or the amount in controversy in a Federal court which, when found by such court, cannot be questioned collaterally<sup>1</sup>; the existence of amount of debt in an involuntary bankruptcy<sup>2</sup>; the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate<sup>3</sup>; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors<sup>4</sup>; and others of a kindred nature, where the lack of jurisdiction does not go to the subject-matter or the parties, but to the preliminary facts necessary to be proven to authorize the court to act.<sup>5</sup>

**§ 23. Decree outside of issues, invalid.**

A decree in equity, which is entirely outside of the issues raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding.<sup>6</sup>

<sup>1</sup> Noble v. Union River Logging R., 147 U. S. 165, 173, 13 Sup. Ct. Rep. 271, 37 L. Ed. 123; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. Rep. 217, 31 L. Ed. 202; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402.

<sup>2</sup> Michaels v. Post, 88 U. S. (21 Wall.) 398, 22 L. Ed. 520.

<sup>3</sup> Comstock v. Crawford, 70 U. S. (3 Wall.) 396, 18 L. Ed. 34; Grignon v. Astor, 43 U. S. (2 How.) 319, 11 L. Ed. 283; Florentine v. Barton, 69 U. S. (2 Wall.) 210, 17 L. Ed. 783.

<sup>4</sup> Thompson v. Tolmie, 27 U. S. (2 Peters), 157, 7 L. Ed. 381.

<sup>5</sup> Hudson v. Guestier, 7 U. S. (6 Cranch) 281, 3 L. Ed. 224; Ex parte Watkins, 28 U. S. (3 Peters) 193, 7 L. Ed. 650.

<sup>6</sup> Reynolds v. Stockton, 140 U. S. 254, 266; 11 Sup. Ct. Rep. 773, 35 L. Ed. 464, approving Munday v. Vail, 34 N. J. Eq. 418.

**§ 24. Power to render the particular judgment; nature of judgment.**

There must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. Every act of a court beyond its jurisdiction is void.<sup>1</sup>

**§ 25. Excessive penalty annuls judgment.**

If a magistrate, having authority to fine for assault and battery only, should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed.<sup>2</sup>

**§ 26. Effect of want of jurisdiction.**

The jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision. The distinction between want of jurisdiction and error is clear. When a court makes an order in a cause over which it has no jurisdiction, it is a nullity. No one is bound to obey it or is liable for disobeying it. Similarly if a court have jurisdiction of a cause and yet make an order in it beyond its power, the order is void. In one case there is action without authority; in the other, action in excess of authority.<sup>3</sup>

**§ 27. Error does not avoid jurisdiction.**

But if a court have jurisdiction to make an order it must be obeyed however wrong it may be. Error must be corrected by appeal, not by disobedience.<sup>4</sup>

**§ 28. Full faith and credit will not be accorded where no jurisdiction.**

Full faith and credit will not be accorded to a judgment or

<sup>1</sup> *Cornett v. Williams* 20 Wall. 226, 22 L. Ed. 254; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538; *Standard Oil v. Missouri*, 224 U. S. 270, 282; *Earle v. McVeigh*, 91 U. S. 503, 507, 23 L. Ed. 398; *Harris v. Hardeman* 55 U. S. (14 Howard) 234, 339, 14 L. Ed. 444.

<sup>2</sup> *Ex parte Reed*, 100 U. S. 13, 25, L. Ed. 538.

<sup>3</sup> *Ex parte Watkins*, 32 U. S. (8 Peters) 568, 572; *Ex parte Fiske*, 113 U. S. 713, 5 Sup. Ct. Rep. 724, 28 L. Ed. 1117; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402; *Brougham v. Oceanic Steam Navigation Co.*, 205 Fed. 857, 860.

<sup>4</sup> *Elliott v. Piersol*, 1 Peters 328, 340, 7 L. Ed. 164; *Brougham v. Oceanic Steam Navigation Co.*, 205 Fed. 857, 860 (C. C. A.).

decree rendered by a court having no jurisdiction of the parties or the subject-matter, or of the *res* in proceedings in *rem*. The jurisdiction of the court may be inquired into.\*

### 29. General remarks.

Courts cannot shirk a plain duty and must entertain jurisdiction when conferred by law. As was said by Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheaton 264, 5 L. ed. 257:

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.”<sup>2</sup>

\* *Thompson v. Whitman* 18 Wall. 547, 21 L. Ed. 897; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. Ed. 464; *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 134; *Thompson v. Thompson*, 226 U. S. 551, 560; *Haddock v. Haddock*, 201 U. S. 562, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525.

<sup>2</sup>Quoted and approved in *ex parte Young*, 209 U. S. 123.

## CHAPTER II

### Federal Decisions—How and When Reviewable

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|---|--|
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<p>Sec. abuse of power or an unconstitutional invasion of property rights.</p> <p>42. Exception to the above rule.</p> <p>43. Moot questions not reviewable— What questions are moot.</p> <p>44. Questions of costs not reviewable, if no other controversy.</p> <p>45. Extrinsic evidence to prove question moot.</p>	<p>Sec.</p> <p>46. Stipulated judgments and decrees not appealable.</p> <p>47. Naturalization cases.</p> <p>48. DECISIONS AFFECTING ATTORNEYS— Reviewable by mandamus.</p> <p>49. Review of disbarment—Remedy by mandamus exclusive.</p> <p>50. Supervisory jurisdiction of the Supreme Court.</p> <p>51. Rights of attorneys.</p>
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### § 1. Constitutional provisions.

The Seventh Amendment to the Constitution of the United States provides:

“No fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.”

And in Section 2 of Article III. of the Constitution of the United States it is laid down that the judicial power of the United States shall extend to all cases, *both in law and in equity*. The Constitution of the United States having thus expressly recognized the distinction between the jurisdiction of courts of law and courts of equity,<sup>1</sup> Congress is without power to abolish it,<sup>2</sup> and the courts of the United States must maintain separately the two systems of jurisprudence and control the procedure in the national courts in accordance with the well-settled principles of law governing the jurisdiction and power of courts of equity as distinguished from courts of law.<sup>3</sup>

### § 2. Courts of law and equity defined.

As a general proposition, courts of equity are those which have jurisdiction in cases where the parties have only equit-

<sup>1</sup> Seventh Amendment to the Constitution of United States; Eleventh Amendment to the Constitution of United States.

<sup>2</sup> *State of Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 460, 15 L. Ed. 450; *Mississippi Mills v. Cohn*, 150 U. S. 205, 37 L. Ed. 1053, 14 Sc. 75.

<sup>3</sup> Sec. 276 Fed. Jud. Code; *Lantry vs. Wallace*, 182 U. S. 550 45 L. 1225, 21 Sc. 878; *Green vs. Mills*, 69 Fed. 952, opinion per Fuller, J. *Montelibano vs. La Compania Tobacos*, 241 U. S. 455, 36 Sc. 617, 60 L. Ed. 1099.

able rights,<sup>1</sup> while courts of law are courts having jurisdiction of actions and suits at law and dealing with legal titles and remedies as distinguished from equitable titles and remedies.

To give effect to the above constitutional provisions and make the division of the two systems of jurisprudence more complete, Congress has from time to time passed laws providing that "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."<sup>2</sup>

### § 3. Transfer of causes.

Up to the time of the promulgation of the equity rules on November 4, 1912, no power existed in a Court of Equity of the United States to transfer a cause erroneously commenced on the equity side of the court to the common law docket, but now the law is<sup>3</sup> that if at any time a suit commenced in equity should have been brought on the law side of the court, or vice versa, it is the duty of the court, instead of dismissing the suit, to transfer the cause to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.<sup>4</sup> Equally the law is now that a mistake in selecting the form or mode of review will not ordinarily be cause for dismissing the appellate proceeding.<sup>5</sup>

The provisions of the U. S. Circuit Court of Appeals Act of March 3, 1891, did not change the mode of procedure and the distinction between appeals in equity and writs of error in common law cases remained.<sup>6</sup>

<sup>1</sup> Engbert L. Dictionary.

<sup>2</sup> Sect. 267 of Federal Judicial Code, 1911; *Equitable Life Ins. Co. v. Brown*, 213 U. S. 25, 53 L. Ed. 682, 29 Sc. 404.

<sup>3</sup> Equity Rule 22, in force January 1, 1913.

<sup>4</sup> Act of Congress of March 3, 1915, amending Sect. 274 of the Judicial Code of 1911.

<sup>5</sup> For new Act see § 7 of this Chapter.

<sup>6</sup> *Rice v. Ames*, 180 U. S. 371, 45 L. Ed. 577, 21 Sc. 406; *Fisher v. Baker*, 203 U. S. 174, 51 L. Ed. 142, 27 Sc. 135.

**§ 4. State procedure not applicable.**

State statutes relating to the granting of new trials or to appellate procedure are not applicable.<sup>1</sup>

**§ 5. Distinction between appeal and error exists in Federal Court.**

In the Courts of the State of New York, by express command of the Code (Sec. 1293), all cases are reviewable by appeal only. But in the Courts of the United States, the distinction between appeals and writs of error still exists.

**§ 6. General rules governing review—Common law judgments and decrees in equity—How reviewed.**

(a) In view of the distinction between common law and equitable actions, the rule is that all common law judgments are reviewable only by writ of error<sup>2</sup> and the review is limited solely to points of law.<sup>3</sup>

(b) All judgments and decrees in equity are reviewable by appeal only.<sup>4</sup>

**§ 7. Mistake in choice of remedy between appeal and error no longer fatal. Act of Sept. 6, 1916.**

The old rule of dismissing the proceeding in the Appellate Court because of the selection of the wrong method for review has been abolished by the recent Act of Congress passed September 6, 1916, providing that "No Court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or

<sup>1</sup> *Bronson v. Schulten*, 104 U. S. 410, 417, 26 L. Ed. 797, 800; *United States v. Mayer*, 235 U. S. 55, 59 L. Ed. 129, 35 Sc. 16.

<sup>2</sup> *Behm, Meyer & Co. v. Campbell*, 205 U. S. 407, 51 L. Ed. 859, 27 Sc. 502; *Walker v. Duville*, 12 Wall. 440, 20 L. Ed. 429; *United States v. Hailey*, 118 U. S. 233, 30 L. Ed. 173, 6 Sc. 1049; *Robert v. Great Northern Ry.*, 138 Fed. 711 (C. C. A.); *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403.

<sup>3</sup> *Atlantic C. L. R. Co. v. Thompson* 211 F. 889-128 C. C. A. 267; *Chicago Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 246, 41 L. Ed. 988, 17 Sc. 581; *Dower v. Richards*, 151 U. S. 663, 38 L. Ed. 305, 14 Sc. 452.

<sup>4</sup> *Carin v. Insular Government*, 212 U. S. 449, 53 L. Ed. 594, 29 Sc. 334; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403; *Frankfort v. Deposit Bank*, 127 Fed. 814, 89 C. C. A. 61, 161 Fed. 868.



dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed." (§ 1649a, Act Sept. 6, 1916, Chap. 4, § 4).

### § 8. When advisable to use both remedies.

Notwithstanding the liberal rule provided by the recent Act of Congress, it is possible that the Appellate Tribunal might be prevented from giving the desired relief by reason of the form or state of the record brought to it for review.

Accordingly, it is advisable in difficult cases to proceed by both methods, *i. e.*, by appeal and error, which is permissible.<sup>1</sup>

### § 9. Contempt proceedings reviewable by writ of error.

Judgments and orders finding a party to be in contempt of court, although made in the course of civil proceedings, are reviewable in the U. S. Circuit Court of Appeals on a writ of error, where the object of the order is punitive and criminal in character.<sup>2</sup>

An order imposing a fine on an attorney for failure to answer questions before a grand jury is reviewable only by writ of error.<sup>3</sup>

A judgment in criminal contempt committed in the course of a bankruptcy proceeding is reviewable by writ of error.<sup>4</sup>

In view of the uncertainty in classifying the contempt charge,

<sup>1</sup> *Haapi v. Brown*, 239 U. S. 502, 60 L. Ed. 407, 36 S. C. 201; *Grant v. U. S.*, 227 U. S. 74, 57 L. Ed. 423, 33 S. C. 190; *Lockman v. Lane*, 132 Fed. 3, 65 C. C. A. 621; *Hubbard v. Worcester Art Museum*, 196 Fed. 871, 116 C. C. A. 435; see *Lamar v. U. S.*, 241 U. S., p. 103; *Hurst v. Hollingsworth*, 94 U. S. 111, 24 L. Ed. 31; *Plymouth Gold Mining Co. v. Amadore Canal Co.*, 118 U. S. 264, 6 S. C. 1034, 30 L. Ed. 232; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601, 6 S. C. 570.

<sup>2</sup> *Re Merchants Stock & Grain Co.* 223 U. S. 639, 642, 56 L. Ed. 584, 32 S. C. 339; *Gompers v. Buck Store & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 S. C. 492; *In re Christensen Engineering Co.*, 194 U. S. 458, 48 L. Ed. 1072, 24 S. C. 729; *Bank v. Hawkins*, 190 Fed. 924, 111 C. C. A. 514.

<sup>3</sup> *Grant v. U. S.* 227, U. S. 74, 57 L. Ed. 423, 33 S. C. 190.

<sup>4</sup> *Freed v. Central Trust Co. of Illinois*, 215 Fed. 873 (C. C. A. 7th Circuit).

a writ of error will sometimes be treated as a petition to revise to avoid injustice.<sup>1</sup>

**§ 10. Interlocutory contempt orders not reviewable.**

Contempt orders which are purely remedial as between the parties to the suit, remain interlocutory and are not reviewable, except on appeal from the final decree.<sup>2</sup>

**§ 11. When order in contempt not reviewable.**

An order complained of which is part of the original suit cannot be brought up for review by writ of error. Errors in equity suits can only be corrected in the court on appeal, and that after a final decree. An order which is merely a part of the civil proceedings is interlocutory.

If the proceeding, which was for contempt, was independent of and separate from the original suit, it cannot be reexamined by either writ of error or appeal.<sup>3</sup>

**§ 12. Punitive order in contempt a criminal judgment.**

An order decreeing that "he pay to the United States a fine of \$200.00 and the costs, and that he stand committed to the custody of the marshal until said fine and costs shall have been paid" is in effect a criminal judgment and so reviewable by writ of error.<sup>4</sup>

**§ 13. Contempt a specific offense.**

Contempt of court is a specific criminal offense. The imposition of a fine is a judgment in a criminal case.<sup>5</sup>

**§ 14. When order is punitive.**

Where the order made against the accused is punitive, it is a

<sup>1</sup> Freed v. Central Trust Co. of Ill., 215 Fed. 873 (C. C. A. 7th Circuit).

<sup>2</sup> Hultberg v. Anderson, 214 Fed. 349; Bessette v. W. B. Conkey Co., 194 U. S. 324, 325, 326, 24 Sup. Ct. 665, 48 L. Ed. 997; In re Merchants' S. & G. Co., 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584.

<sup>3</sup> Hayes v. Fisher, 102 U. S. 121; Bessette v. Conkey Co. supra.

<sup>4</sup> Sona v. Aluminum Casting Co., 214 F. 936, 131 C. C. A. 232, supra; Brown v. Detroit Trust Co., 193 Fed. 623; Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 L. Ed. 997.

<sup>5</sup> Stuart v. Reynolds, 204 Fed. 715; In re Frankel, 184 Fed. 542.

final judgment in its nature and reviewable on writ of error without awaiting such final decree.<sup>1</sup>

**§ 15. Criminal cases. Judgments reviewed by writ of error.**

Judgment of conviction in a criminal case is reviewable only by writ of error.<sup>2</sup>

**§ 16. Writ of error to review judgment in mandamus proceedings.**

A writ of error and not appeal is the proper method of securing a review of a judgment of a Federal court granting or refusing a writ of mandamus.<sup>3</sup>

**§ 17. Judgments under Pure Food Law.**

In judgments under Food and Drug Act § 10, review is obtained by writ of error only.<sup>4</sup>

**§ 18. Decisions in Interstate Commerce Matters.**

Writ of error and not appeal is the proper method to bring up for review, the correctness of the decision of a U. S. District Court requiring carriers to submit their books and papers for examination to the Interstate Commerce Commission.<sup>5</sup>

**§ 19. Order setting aside judgment after term.**

An order made after term setting aside a judgment at law dismissing the suit and restoring case on the docket is reviewable by writ of error on a question of jurisdiction of the trial court in making such order.<sup>6</sup> An order made after term in a criminal

<sup>1</sup> *Gompers v. Buck Stove and Range Co.*, 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797; *Phillips, S. T., Co. v. Amalgamated Ass'n of I. S. & T. W.*, 208 Fed. 335; *In re Merchants' Stock Co.*, supra; *Bessette v. Conkey Co.*, 194 U. S. 324, supra; *In re Christensen Engineering Co.*, 194 U. S. 458, 48 L. Ed. 1072, 24 S. C. 729; *Grant v. United States*, 227 U. S. 74, 76, 57 L. Ed. 423, 33 S. C. 190.

<sup>2</sup> *Grant v. U. S.*, 227 U. S. 74, supra; *Bucklein v. United States*, 159 U. S. 680, 40 L. Ed. 304, 16 S. C. 182; *Bessette v. Conkey Co.*, supra. For appeal by Government see Chap. III. § 22.

<sup>3</sup> *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 45 S. C. 363.

<sup>4</sup> *Lexington Mill & El. Co. v. U. S.*, 202 Fed. 615, 121 C. C. A. 23; *U. S. v. Lexington Mill & Elev. Co.*, same case affirming 202 F. 615, 232 U. S. 399, 58 L. Ed. 658, 34 S. C. 337.

<sup>5</sup> *United States v. Louisville & N. R. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 S. C. 363.

<sup>6</sup> *Hamilton Coal Co. v. Watts* (C. C. A. 2d Cir.) 232 Fed. 832.

case affecting the judgment is also reviewable on the question of jurisdiction.<sup>2</sup>

**§ 20. Necessity for final determination—jurisdictional prerequisite.**

In order to obtain a review in the Supreme Court or in the United States Circuit Court of Appeals, it is imperative that the judgment or decree appealed from be final in its nature.<sup>3</sup>

**§ 21. Doubt resolved against finality.**

Every doubt is resolved against finality of a judgment.<sup>3</sup>

Matters within the pleadings retained and reserved for further consideration are not determined until final decree.<sup>4</sup>

**§ 22. What are final judgments—final judgment or decree must terminate litigation.**

A judgment or decree is final if it terminates the litigation on the merits so that in case of affirmance the court below will have nothing to do but to execute the judgment or decree it originally rendered.<sup>5</sup>

<sup>2</sup>U. S. v. New York C. R. R. Co., 164 Fed. 324 (C. C. A. 2d Cir.); U. S. v. Clippings, 106 Fed. 161 (C. C. A. 2d Cir.)

<sup>3</sup>Schuyler Natl. Bank v. Gadson, 179 U. S. 681, 45 L. Ed. 384, 21 S. C. 918; Southern Ry. Co. v. Postal Telegraph Cable Co., 179 U. S. 643, 45 L. Ed. 356, 21 S. C. 249; Luxton v. North River Bridge Co., 147 U. S. 341, 37 L. Ed. 196, 13 S. C. 356; Gladys Bell Oil Co. v. McKay, 216 Fed. 129 (C. C. A. 8th Cir.); Rio Grande Western R. R. Co. v. Stringham, 239 U. S. 44, 60 L. Ed. 136, 36 S. C. 5.

<sup>4</sup>Montgomery L. & W. P. Co. v. Montgomery T. Co., 219 F. 963; McGourki v. Toledo & O. C. R. R. Co., 146 U. S. 536, 36 L. Ed. 1079, 13 S. C. 170.

For exceptional cases stating a contrary rule see Halfpenny v. Miller, 232 Fed. 113 (C. C. A. 4th Cir.).

<sup>5</sup>Covington v. First National Bank, 185 U. S. 277, 46 L. Ed. 906, 22 S. C. 645; Peters v. Ferris, 238 U. S. 608, 59 L. Ed. 1487, 35 S. C. 662.

<sup>6</sup>Baxter v. Beville Phillips Co., 219 Fed. 309; Gladys Bell Oil Co. v. McKay, 216 Fed. 129 (C. C. A. 8th Cir.); Dermont v. Hayes, 197 Fed. 129, 116 C. C. A. 553; Robinson v. Felt, 56 Fed. 328, 5 C. C. A. 521; Re Lennon, 150 U. S. 393, 14 S. C. 123, 37 L. Ed. 1120; Lambert v. Barrett, 157 U. S. 700, 15 S. C. 722, 39 L. Ed. 865; California Consol. Min. Co. v. Manley, 203 U. S. 579, 51 L. Ed. 326, 27 SC. 779; Reeves v. Oliver, 168 U. S. 704, 42 L. Ed. 1212, 18 S. C. 945; Jeske v. Cox, 171 U. S. 685, 43 L. Ed. 1179, 19 S. C. 877; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; Grant v. Insurance Co., 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237; St.

**§ 23. Orders at foot of decree may be final.**

After a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which partake of the nature of final decisions of those rights. An appeal lies from such orders and decrees.<sup>1</sup>

**§ 24. When reference to master does not affect finality.**

Where the decree determines the rights of the parties and refers the cause to a Master for a purpose not affecting the decree, it is final and appealable.<sup>2</sup>

**§ 25. Decree *pro confesso* final, but review limited.**

A decree *pro confesso* is final, but the review is limited to the legal sufficiency of the bill of complaint.<sup>3</sup>

**§ 26. Judgments and decrees held final.**

(a) A judgment in an action for a writ of prohibition is final.<sup>4</sup>

(b) An order allowing attorney's fees made in the progress of a creditor's suit is final and appealable.<sup>5</sup>

Louis I. M. & S. R. Co. v. Southern Exp. Co., 108 U. S. 24, 2 Sup. Ct. Rep. 6, 27 L. Ed. 638; Ex parte Norton, 108 U. S. 237, 2 Sup. Ct. Rep. 490, 27 L. Ed. 709.

<sup>1</sup> In re Farmers' Loan & Trust Co., 129 U. S. 206, 213, 9 Sup. Ct. Rep. 265, 266, 32 L. Ed. 656; O'dell v. H. Batterman Co., 223 Fed. 292.

<sup>2</sup> Mariam Coal Co. v. Peale, 204 Fed. 161, 122 C. C. A. 397; McGourki v. Toledo & O. R. Co., 146 U. S. 536, 36 L. Ed. 1079, 13 S. C. 170; Hill v. Chicago & E. R. Co., 140 U. S. 52, 38 L. Ed. 331, 11 S. C. 690; Bank of Louisburg v. Sheffey, 140 U. S. 445, 35 L. Ed. 493, 11 S. C. 759; Menge v. Warriner, 120 Fed. 818, 57 C. C. A. 434; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Andrews v. Natl. Fdry. & Pipe Works, 73 Fed. 518, 19 C. C. A. 551; Dean v. Nelson, 7 Wallace 342, 19 L. Ed. 94; Burlington C. R. & N. R. Co. v. Simmons, 123 U. S. 55, 31 L. Ed. 74, 8 S. C. 58.

<sup>3</sup> Griggs v. Nadeau, 221 F. 381; Tire Co. v. Car Co., 39 App. (D. C.) 508.

<sup>4</sup> In re Mt. Vernon, 240 U. S. 30, 60 L. Ed. 507, 36 S. C. 234.

<sup>5</sup> Central Trust Co. v. U. S. Heating Co. (C. C. A. 2d Cir.), 233 Fed. 420; Yorkshire, etc., Co. v. Fowler, 78 Fed. 58, 23 C. C. A. 643; Tuttle v. Clafin, 88 Fed. 122, 31 C. C. A. 419.

(c) A judgment making an extra allowance for costs is appealable.<sup>1</sup>

(d) A right of appeal exists to review a decree dismissing the bill to one copyright, although the suit embraced two copyrights,<sup>2</sup> but the opposite of it was held in the Second Circuit.<sup>3</sup>

(e) An order of a District Court in an interstate proceeding instituted by the Interstate Commerce Commission to compel answer to certain questions is final and appealable.<sup>4</sup>

(f) An order made in the course of a foreclosure proceeding for the payment of money for certain materials is final and appealable.<sup>5</sup>

(g) An order granting or refusing a writ of mandamus is final and appealable.<sup>6</sup>

(h) The decisions of the U. S. District Court and the U. S. Circuit Court of Appeals in revenue cases are reviewable by appeal and not writ of error.<sup>7</sup>

### § 27. Orders refusing intervention final and appealable.

Where the right of intervention is refused and the rights of the interveners are seriously threatened, an appeal will be entertained.<sup>8</sup>

An order dismissing a petition for intervention disposing of the rights of the petitioner is a final judgment as to that issue and is reviewable by appeal.<sup>9</sup>

<sup>1</sup> Motion Picture Patent Co. v. Steiner, 201 Fed. 63, 119 C. C. A. 401.

<sup>2</sup> Historical Pub. Co. v. Jones Bros. Pub. Co. (C. C. A.), 231 Fed. 638.

<sup>3</sup> Stromberg v. Oronson (C. C. A. 2d Cir.), decided January 9, 1917.

<sup>4</sup> Ellis v. Interstate Commerce Commission, 237 U. S. 434, 59 L. Ed. 1036, 35 S. C. 645.

<sup>5</sup> Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97, 16 S. C. 736; Empire Trust Co. v. Brooks (C. C. A. 5th Cir.), 232 Fed. 641; Wabash R. R. Co. v. Adelbert College, 208 U. S. 609, 52 L. Ed. 642, 28 S. C. 425; Grant v. E. & W. R. R. Co., 50 Fed. 795, 1 C. C. A. 681.

<sup>6</sup> Detroit & M. Ry. v. Michigan R. R., et al, 240 U. S. 564, 60 L. Ed. 802, 36 S. C. 160; Davis v. Corbin, 112 U. S. 36, 28 L. Ed. 327, 5 S. C. 4; Rosenbaum v. Bauer, 120 U. S. 461, 30 L. Ed. 747; Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244.

<sup>7</sup> Gsell v. Insular Custom Collector, 239 U. S. 93, 60 L. Ed. 163, 36 S. C. 39.

<sup>8</sup> Central Trust Co. v. Chicago R. I. & P. Ry. Co., 218 Fed. 336, 134 C. C. A. 146 (2d Circuit).

<sup>9</sup> Gumbel v. Pitkin, 113 U. S. 545, 28 L. Ed. 1128, 5 S. C. 616; Denny v. Bennett, 128 U. S. 503, 32 L. Ed. 496, 9 S. C. 134; Central R. & B. K. Co. v. Farmers' Loan & Trust Co., 79 Fed. 169.

**§ 28. Order limiting liability in admiralty.**

An order limiting the liability of a steamship company and enjoining parties from further proceedings is appealable to the U. S. Circuit Court of Appeals.<sup>1</sup>

**§ 29. Habeas corpus orders final and appealable.**

The refusal to grant a writ of habeas corpus is final and appealable.<sup>2</sup>

Habeas corpus cases are reviewable by appeal only.<sup>3</sup>

An order discharging a prisoner is final and appealable.<sup>4</sup>

**§ 30. Appealable orders on sales and resale.**

A decree of sale is appealable.<sup>5</sup>

And decisions of the court confirming or refusing to confirm a sale are also appealable.<sup>6</sup>

**§ 31. Appeal from order setting aside sale.**

A decree setting aside a sale on foreclosure and ordering a resale does not end the case. That continues with all the parties in that suit before the sale. But the bidder at the sale becomes a new party; the acceptance of his bid gives him the rights of a purchaser unless legal objection to confirmation is shown. Therefore, he may appeal from that order, it being final as to him.<sup>7</sup>

**§ 32. Judgment or decree not final when motion to set aside pending.**

<sup>1</sup> *Deslinois v. La Campagne Generale Transatlantique*, 210 U. S. 95, 52 L. Ed. 973, 28 S. C. 664; In *Oceanic Steam Navigation Co.* (C. C. A. 2d Cir.), 204 Fed. 259; but, contra, see *The Transfer*, 218 Fed. 636, decided by the same court.

<sup>2</sup> *Walters v. McKennis*, 221 Fed. 746; *Palliser v. United States*, 136 U. S. 257, 34 L. Ed. 514, 10 S. C. 1034.

<sup>3</sup> *Horn v. Mitchell*, 223 Fed. 549; *Rice v. Ames*, 180 U. S. 371, 45 L. Ed. 577, 21 S. C. 406; *Fisher v. Baker*, 203 U. S. 174, 51 L. Ed. 142, 27 S. C. 135.

<sup>4</sup> *Brown v. Fletcher*, 231 F. 92; *Harkarder v. Wadley*, 172 U. S. 148, 43 L. Ed. 399, 19 S. C. 119; *Brimmer v. Redmond*, 138 U. S. 78, 34 L. Ed. 862, 11 S. C. 213; *Crico v. Wilmore*, 51 Fed. 202.

<sup>5</sup> *East Coast Cedar Co. v. Peoples' Bank*, 111 Fed. 449, 49 C. C. A. 425; *Baxter v. Revell P. Co.*, 219 F. 309.

<sup>6</sup> *Stokes v. Williams*, 226 F. 148; *Butterfield v. Usher*, 91 U. S. 246, 23 L. Ed. 318; *Hovey v. McDonald*, 109 U. S. 155, 27 L. Ed. 890, 3 S. C. 136; *Bank of Louisburg v. Sheffey*, 140 U. S. 452, 35 L. Ed. 496, 11 S. C. 759.

<sup>7</sup> *Investment Registry v. Chicago & M. E. R. Co.*, 212 Fed. 594 (C. C. A. 7th Cir.)

A judgment does not become final so it could be appealed from until a motion to set it aside is disposed of.<sup>1</sup>

(a) **A decree in alternative not final.**

A decree is not final which is in the alternative and by the terms of which a party has the right to select either one or the other course indicated by the decree. Until the election to abide or reject the terms of the decree has been made, the decree is regarded as interlocutory.<sup>2</sup>

**§ 33. Decrees and orders held not final—when.**

(a) A mere reference of a case to a Master to take an account and report back to the court is not regarded as a final decree.<sup>3</sup>

(b) Orders to pay money into court pending future determination as to the disposition of same are not appealable.<sup>4</sup>

(c) A judgment of the U. S. Court of Appeals is not final when it reverses the judgment in the District Court in a condemnation case and vacates the Commissioners' award and directs a new assessment by a jury.<sup>5</sup>

(d) An order of the District Court in chambers declining to grant a writ of habeas corpus is not a final decision.<sup>6</sup>

(e) One arrested in a civil proceeding and held in bail cannot

<sup>1</sup> *Omaha El. L. & P. Co. v. City of Omaha*, 216 Fed. 848; *Voorhees v. John Mfg. Co.*, 151 U. S. 135, 38 L. Ed. 101, 14 S. C. 295; *Mason v. Pewabic Min. Co.* 153 U. S. 366, 38 L. Ed. 747, 14 S. C. 847; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 678, 42 L. Ed. 1193, 18 S. C. 786; *Fuller v. Lake Erie & W. R. R. Co.*, 105 Fed. 557, 44 C. C. A. 599; *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244.

<sup>2</sup> *Paducah v. East Telephone Co.*, 229 U. S. 476, 57 L. Ed. 1287, 33 S. C. 816.

<sup>3</sup> *Odell v. Batterman*, 223 F. 292; *Latta v. Kilborn*, 150 U. S. 539, 37 L. Ed. 1175, 14 S. C. 201; *California Natl. Bank v. Statler*, 171 U. S. 449, 43 L. Ed. 234, 19 S. C. 6; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 91, 33 L. Ed. 275, 10 S. C. 32; *Siegel v. Swarts*, 187 U. S. 638, 47 L. Ed. 344, 23 S. C. 846.

<sup>4</sup> *Des Moines v. Des Moines W. Co.*, 230 F. 570; *Craighead v. Wilson*, 18 How. 202, 15 L. Ed. 333; *Reeves v. Oliver*, 168 U. S. 704, 42 L. Ed. 1212, 18 S. C. 945; *Louisiana Natl. Bank v. Whitney*, 121 U. S. 284, 30 L. Ed. 961, 7 S. C. 897; *Southern Ry. Co. v. Postal Telegraph Cable Co.*, 179 U. S. 643, 21 S. C. 249; *Southern Ry. Co. v. Postal Telegraph Cable Co.*, 93 Fed. 396, 35 C. C. A. 369.

<sup>5</sup> *U. S. v. Beatty*, 232 U. S. 463, 58 L. Ed. 686, 34 S. C. 392.

<sup>6</sup> *Lambert v. Barrett*, 157 U. S. 697, 39 L. Ed. 865, 15 S. C. 722; *Frank v. Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 S. C. 582.



appeal or sue out a writ of error from an order denying his motion to a discharge, as the order is merely interlocutory.<sup>2</sup>

(f) Orders quashing executions are not final or appealable.<sup>2</sup>

(g) Orders to produce books and papers.<sup>3</sup>

### § 34. When review must await further proceedings.

(a) A decree dismissing a bill as against one of the defendants for want of jurisdiction over the person of such defendant is not final until the main case is disposed of against the remaining co-defendants, where the liability is joint and not several.<sup>4</sup>

(b) A decree dismissing a cross-bill, but reserving jurisdiction as to the rest of the case, is not final.<sup>5</sup>

(c) In partition suits the decree is not final until all the directions of the court have been executed and confirmed.<sup>6</sup>

(d) An order appointing commissioners to assess damages is not final until the court approves the award and enters judgment therefor.<sup>7</sup>

(e) An assessment of the amount due from garnishees in a foreign attachment on a libel in admiralty is interlocutory and an appeal will not lie until final disposition of the main case.<sup>8</sup>

### § 35. On appeal in equity, law and fact reviewed.

Both law and fact will be reexamined in equity.<sup>9</sup> In contradistinction from the practice in law cases, findings of fact or

<sup>2</sup> Crocker v. Knudsen (C. C. A. 9th Cir.), 232 Fed. 857.

<sup>2</sup> Loeber v. Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 S. C. 934; Amis v. Smith, 16 Peters 303, 10 L. Ed. 973; Mountz v. Hodgson, 4 Cranch 324, 2 L. Ed. 635.

<sup>3</sup> Webster Coke & Coal Co., 207 U. S. 181, 187.

<sup>4</sup> In re Garrosi, 229 F. 363; Re Atlanta City Ry. Co. 164 U. S. 635, 41 L. Ed. 580, 17 S. C. 208; Nash v. Harshman, 149 U. S. 264, 37 L. Ed. 727, 13 S. C. 845; Hohorst v. Hamburg-American Pac. Co., 148 U. S. 262, 37 L. Ed. 447, 13 S. C. 590; Menge v. Warriner, 120 Fed. 817, 57 C. C. A. 433.

<sup>5</sup> Gladdys v. Makey, 216 Fed. 129, 132 C. C. A. 373.

<sup>6</sup> Odell v. Batterman, 223 F. 292; Clark v. Roller, 199 U. S. 541, 50 L. Ed. 300, 26 S. C. 141.

<sup>7</sup> Odell v. Batterman, supra; Luxton v. North River Bridge Co., 147 U. S. 337, 37 L. Ed. 196, 13 S. C. 356.

<sup>8</sup> Cushing v. Laird, 107 U. S. 69, 27 L. Ed. 391, 2 S. C. 196.

<sup>9</sup> Dower v. Richards, 151 U. S. 663, 38 L. Ed. 305, 14 S. C. 452.

verdicts of juries in equity causes, while entitled to great weight and due consideration, are not conclusive upon the reviewing court.<sup>1</sup> As an appeal in equity in the Federal courts is practically a trial *de novo*, the appellate court is not compelled to affirm an unjust decree.<sup>2</sup>

**§ 36. Concurrent findings of fact will not be disturbed.**

The rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by the Supreme Court of the United States unless shown to be clearly erroneous.<sup>3</sup>

**§ 37. Rule not applicable where no opinion is filed.**

But this principle ordinarily will not be followed where the Circuit Court of Appeals filed no opinion.<sup>4</sup>

**§ 38. Rule similar in patent matters.**

In all patent matters partaking of equitable cognizance, the rule of not disturbing concurrent findings of fact has been adopted.<sup>5</sup>

**§ 39. Review of Master's Report.**

In the absence of any exceptions, the master's report

<sup>1</sup> U. S. v. Clark, 200 U. S. 601, 51 L. Ed. 613, 26 S. C. 340.

<sup>2</sup> Central Improvement Co. v. Cambria Steel Co., 210 Fed. 697 (C. C. A.).

<sup>3</sup> E. L. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 59 L. Ed. 142, 35 S. C. 91; Missouri R. Co. v. Omaha, 235 U. S. 121, 59 L. Ed. 157, 35 S. C. 82; Washington Securities Company Appt. v. United States, 234 U. S. 76, 58 L. Ed. 1220, 34 S. C. 725; Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 438, 34 Sup. Ct. Rep. 438, 34 S. C. 436; Dun v. Lumbermen's Credit Assn. 209 U. S. 20, 23, 52 L. Ed. 663, 665, 28 Sup. Ct. Rep. 335; Towson v. Moore, 173 U. S. 17, 24, 43 L. Ed. 597, 600, 19 Sup. Ct. Rep. 332; Stuart v. Hayden, 169 U. S. 1, 14, 42 L. Ed. 639, 643, 18 Sup. Ct. Rep. 274; Thallman v. Thomas, 49 C. C. A., 317, 111 Fed. 277; Hussey v. Richardson-Roberts Dry Goods Co., 78 C. C. A., 370, 148 Fed. 598, 602, and cases cited; Lacy v. McCaffey, 215 Fed. 352 (C. C. A. 352); Blank v. Aronson, 109 C. C. A. 327, 330.

<sup>4</sup> Wright-Blodgett Co. v. U. S., 236 U. S. 397, 59 L. Ed. 637, 35 S. C. 339.

<sup>5</sup> General Electric Co. v. Slemberger, 208 Fed. 700; Laas v. Scott (C. C. A.), 161 Fed. 122; Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, 166 Fed. 288, 92 C. C. A. 206; Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; Coffin v. Ogden, 18 Wall. (85 U. S.) 120, 21 L. Ed. 821; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

will be taken as true, and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court.<sup>1</sup>

But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc., Ry. Co. v. Gordon*, 151 U. S. 285, 291, 14 Sup. Ct. 343, 344 (38 L. Ed. 164), the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said:

“It is true that, if the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error; but we see no occasion for exercising such discretion in this case.”

It is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed.<sup>2</sup>

But where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree.<sup>3</sup>

#### § 40. Master's findings—how far conclusive.

A clear distinction is drawn between a reference to a master by the consent of the parties and a reference to a master solely by the action of the court. In the former case the parties virtually constitute the master an arbitrator to decide between them and his findings on questions of fact or of mixed law and fact, where the testimony or other evidence is conflicting, unless under exceptional circumstances, are conclusive upon them.<sup>4</sup> Where the reference is by the court, and not through the consent of the parties, a different rule applies; the finding of the master on

<sup>1</sup> *Laswell Land Co. v. Wilson, Co.*, 236 Fed. 322 (C. C. A.); *Central Imp. Co. v. Cambria Steel Co.*, 210 F. 696; *Burns v. Rosenstein*, 135 U. S. 449, 34 L. Ed. 193, 10 S. C. 718; *Provident Life v. Trust Co.*, 177 Fed. 854, 101 C. C. A. 68.

<sup>2</sup> *Cent. Imp. Co. v. Cambria Steel Co.* 210 Fed. 696 (C. C. A.).

<sup>3</sup> *Cent. Imp. Co. v. Cambria Steel Co.*, 210 Fed. 696.

<sup>4</sup> *Bates v. Dresser*, 229 F. 772; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

questions of fact carrying with it less weight than in the former case. The findings and conclusions of the master are clothed with a presumption of correctness, not lightly to be disregarded. Unless in a clear case the findings and conclusions of the master based upon conflicting testimony and evidence will not be disturbed. Hence the findings of the master even where the reference is not by the consent of the parties are *prima facie* correct.<sup>1</sup>

**§ 41. Orders of the Interstate Commerce Commission are not reviewable in any court except for a gross abuse of power or an unconstitutional invasion of property rights.**

The statute makes the finding of the Interstate Commerce Commission *prima facie* correct.<sup>2</sup>

**§ 42. Exception to the above rule.**

The orders of the Interstate Commerce Commission are final and are not reviewable in any court unless

- (1) beyond the powers which it may constitutionally exercise;
- (2) beyond its statutory power;
- (3) based upon a mistake of law<sup>3</sup>; or
- (4) when law and fact are intermixed.<sup>4</sup>

A question of fact may be involved in the determination of

<sup>1</sup> *Continuous Glass Co. v. Schmertz Glass Co.*, 219 F. 205; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Metzker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Unhairing Co. v. American Fur Refining Co.*, 168 Fed. 529, C. C. A. 546.

<sup>2</sup> *Cincinnati H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 154, 51 L. Ed. 1000, 27 S. C. 648; *Interstate Commerce Commission v. Union Pac. Co.*, 222 U. S. 311, 56 L. Ed. 311, 32 S. C. 108.

<sup>3</sup> *Interstate Commerce Commission v. Union Pac. Co.*, 222 U. S. 541, 56 L. Ed. 311, 32 S. C. 108.

<sup>4</sup> *Interstate Commerce Commission v. Union Pacific Co.*, 222 U. S. 541, 545, 56 L. Ed. 311, 32 S. C. 108; *Southern Pacific R. R. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 S. C. 288; *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 470, 54 L. Ed. 287, 30 S. C. 155; *Interstate Commerce Commission v. Northern Pacific R. R. Co.*, 216 U. S. 544, 54 L. Ed. 609, 30 S. C. 417; *Interstate Commerce Commission v. Alabama & Midland R. Co.*, 168 U. S. 146, 174, 42 L. Ed. 414, 18 S. C. 45.

questions of law, so that an order, regular on its face, may be set aside, if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law or if the Commission acted arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it, or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.<sup>1</sup>

**§ 43. Moot questions not reviewable—what questions are moot.**

To entitle a party to an appellate review there must exist between the parties at the time the appellate tribunal reaches the case a live and real substantial controversy or it will be dismissed. The appellate tribunal will not consider moot cases or abstract propositions of law.<sup>2</sup>

**§ 44. Questions of costs not reviewable, if no other controversy.**

The fact that questions of costs are involved does not alter the rule as to the dismissal of moot questions.<sup>3</sup>

**§ 45. Extrinsic evidence to prove question moot.**

Upon the point whether the questions presented are in fact

<sup>1</sup> Interstate Commerce Comm. v. Union Pacific, *supra*.

<sup>2</sup> Hamburg-American v. Packerfarth Actien Gesellschaft, 239 U. S. 466, 36 S. C. 212, 60 L. Ed. 387; East Tennessee, Virginia, and Georgia Railroad Co. v. Southern Telegraph Co., 125 U. S. 695, 31 L. Ed. 853, 8 S. C. 1391; Lewis Publishing Co. v. Wyman, 228 U. S. 610, 33 S. C. 519, 57 L. Ed. 989; Bemer v. Hayes, 80 Fed. 953, 26 C. C. A. 271; Wingert v. National Bank, 223 U. S. 670, 56 L. Ed. 605, 32 S. C. 391; Mills v. Green, 159 U. S. 651, 40 L. Ed. 293, 16 S. C. 132; Gompers v. Buck Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 31 S. C. 492; Buck Stove Co. v. Federation of Labor, 219 U. S. 581, 55 L. Ed. 345, 31 S. C. 472; Board of Flour Inspectors & Co. v. Glover 160 U. S. 170, 40 L. Ed. 382, 16 S. C. 321.

<sup>3</sup> Wingert v. First National Bank, 223 U. S. 670, 672, 32 Sup. Ct. Rep. 391, 56 L. Ed. 605; Gompers v. Buck Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 31 S. C. 492; Buck Stove & Range Co. v. American Federation of Labor, 219 U. S. 581, 55 L. Ed. 345, 31 S. C. 472; Richardson v. McChesney, 218 U. S. 487, 54 L. Ed. 1121, 31 S. C. 43; Jones v. Montague, 194 U. S. 147, 48 L. Ed. 913, 24 S. C. 611; Mills v. Green, 159 U. S. 657, 40 L. Ed. 293, 16 S. C. 132.

moot, the court may satisfy itself, if necessary, by extrinsic evidence.<sup>1</sup>

#### § 46. Stipulated judgments and decrees not appealable.

Judgments and decrees entered by stipulation of the parties are not appealable.<sup>2</sup>

#### § 47. Naturalization cases.

The decisions as to the right of appeal in naturalization cases are not harmonious. In the Fourth and Fifth Circuit it has been held that judgments and decrees refusing naturalization are not reviewable either by appeal or error<sup>3</sup>, while in the Second Circuit appeals were entertained.<sup>4</sup> In a recent case, *U. S. v. Mayer*, decided April 12, 1917, the Circuit Court of Appeals for the Second Circuit entertained an appeal and held that German aliens who filed their petitions prior to the declaration of war with Germany may be admitted if otherwise qualified.

#### § 48. Decisions affecting attorneys—reviewable by mandamus.

Where an inferior court, acting without jurisdiction, disbars an attorney from practicing law for a contempt committed by the attorney before another court, a writ of mandamus may be resorted to to compel the reinstatement of the attorney upon the roll of attorneys.<sup>5</sup>

<sup>1</sup> *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Jones v. Montague*, 194 U. S. 137, 24 Sup. Ct. 611, 48 L. Ed. 913; *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. Ed. 1121; *Buck Stove, etc., Co. v. American Federation of Labor*, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345; *Gompers v. Buck Stove, etc., Co.* 221 U. S. 418, 451, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Meyers v. Cheesman (C. C. A.)*, 174 Fed. 783, 785, 98 C. C. A. 491.

<sup>2</sup> *Knott v. St. Louis S. W. R. R. Co.*, 230 U. S. 509, 57 L. Ed. 1595, 33 S. C. 984.

<sup>3</sup> *U. S. v. Dola*, 177 Fed. 104 (4th Cir.), 130 C. C. A. 521, 21 Ann. Cases 665; *U. S. v. Neugebauer*, 221 Fed. 938, 137 C. C. A. 508 (5th Cir.)

<sup>4</sup> *U. S. v. Cohen*, 179 Fed. 836, 103 C. C. A. 324; *Younghouse v. U. S.* 218 Fed. 168, 134 C. C. A. 67, and also dissenting opinion of Judge Hough in *U. S. v. Mulvy*, 232 Fed. 513.

<sup>5</sup> *Ex parte Bur* 9 Wheat. 529, 6 L. Ed. 152; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Ex parte Secombe*, 19 How. 13, 15 L. Ed. 565; *Ex parte Robinson*, 19 Wall. 513, 22 L. Ed. 205; *Ex parte Wall*. 107 U. S. 265, 27 L. Ed. 552.

### § 49. Review of disbarment—Remedy by mandamus exclusive.

The Circuit Court of Appeals for the Sixth Circuit<sup>1</sup> held that, since the passage of the Court of Appeals Act, a judgment striking the name of an attorney from the rolls was reviewable by writ of error, but in the same case the Supreme Court of the United States held that the remedy by mandamus was exclusive.<sup>2</sup>

### § 50. Supervisory jurisdiction of the Supreme Court.

The Supreme Court of the United States will entertain jurisdiction for the purpose of protecting the members of the Bar as officers of the court from illegal and oppressive orders of inferior courts.

### § 51. Rights of attorneys.

The late Chief Justice Fuller, in *In re Sachs*, 190 U. S. 1, laid down the following rule:

“In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.”

And in *Ex parte Garland*, 71 U. S. 379, the judge says:

“The attorney and counselor being, by the solemn, judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.”

<sup>1</sup> *In re Thatcher*, 212 Fed. 801, C. C. A. 6th Circuit.

<sup>2</sup> *Thatcher v. United States*, 241 U. S. 644; 60 L. Ed. 1218; 36 Sup. Ct. Rep. 450; *Ex parte Bradley*, 74 U. S. (7 Wall.) 364, 19 L. Ed. 214; *Ex parte Garland*, 71 U. S. (4 Wall.) 379, 18 L. Ed. 366; *Ex parte Robinson* (19 Wall.), 86 U. S. 512, 22 L. Ed. 205; *In re Sachs and Watts*, 190 U. S. 1, 47 L. Ed. 933, 23 S. C. 718; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. C. 385.

## CHAPTER III

## Who may Apply for Review of a Judgment or Decree Entered in a Federal Court

## SEC.

1. All parties to the record, their privies and personal representatives may ask review.
2. Bankrupt may appeal in his own name.
3. Party in contempt not deprived of right of appeal.
4. Next friend of insane person may appeal.
5. All united in interest must join in appeal or error. Especially in equity causes.
6. Separate appeal permitted where interest is separate.
7. Party added by order of court may ask review.
8. Statutory receiver of corporation may appeal.
9. Receiver cannot appeal.
10. Purchaser at Judicial Sale may appeal.
11. Procedure for severance of record.
12. Special notice unnecessary when taken in open court.
13. Severance by amendment to bring in omitted parties.
14. Waiver of severance.

## SEC.

- (a) Dismissal for want of compliance with the above rule.
15. When intervenors may appeal—refusing intervention.
16. Leave to appeal compelled by mandamus.
17. Appeal the method of review in intervention.
18. Intervenor may appeal also.
  - (a) After cause dismissed.
  - (b) After intervention granted.
  - (c) All parties to be brought into court.
19. Persons not parties to record—when heard.
20. Only those affected may assail constitutionality of a statute.
21. Who may assail state statutes.
22. Government cannot appeal or bring certiorari in criminal cases, except under Criminal Appeals Act.
23. Suits in *forma pauperis*: Seamen's Suits.
  - (a) The Statute.
  - (b) Construction of Statute.

§ 1. All parties to the record, their privies and personal representatives may ask review.

All parties to the record and their privies or personal representatives who are aggrieved by the judgment or decree and have some interest in the subject-matter of the suit, may appeal or sue out a writ of error. Strangers to the record as a rule cannot do so.\*

\* *Ex parte Leaf Tobacco v. Board of Trade of New York City*, 222 U. S. 578, 32 Sup. Ct. Rep. 833, 56 L. Ed. 323; *U. S. ex rel Boardman v. Louisiana*, 217 Fed. 757, 133 C. C. A. 487; *Credits Commutation Co. v. United States*, 177 U. S. 311, 317, 44 L.



**§ 2. Bankrupt may appeal in his own name.**

Judgment entered against a defendant after an adjudication in bankruptcy may be reviewed on a writ of error sued out in his own name.<sup>1</sup>

**§ 3. Party in contempt not deprived of right of appeal.**

The fact that a party is in contempt of court does not deprive him of his right to appeal from any judgment or decree affecting his interest.<sup>2</sup>

**§ 4. Next friend of insane person may appeal.**

The next friend of an insane person may sue out a writ of error pending the appointment of a guardian *ad litem*.<sup>3</sup>

**§ 5. All united in interest must join in appeal or error—Especially in equity cases.**

The rule is inflexible that all parties to a judgment or decree must join in an appeal or writ of error or be detached from the right by some proper proceeding or by their renunciation.<sup>4</sup> (For form of Notice of Severance see Appendix 53.

Ed. 782, 786, 20 S. C. 636; Indiana Southern R. R. Co. v. Liverpool L. & G. Ins. Co., 109 U. S. 163, 27 L. Ed. 895, 3 S. C. 108; South Carolina v. Wesley, 155 U. S. 542, 39 L. 254, 15 S. C. 230; Elwell v. Fosdick, 134 U. S. 500, 513, 33 L. Ed. 998, 1002, 10 S. C. 598; Kidder v. Northwestern Mutual Life Ins. Co., 117 Fed. 999; Hunt v. Oliver, 109 U. S. 177, 27 L. Ed. 897, 3 S. C. 114; Guion v. Liverpool, London and Globe Ins. Co., 109 U. S. 173, 27 L. Ed. 895, 3 S. C. 108; Savannah v. Jesup, 106 U. S. 563, 27 L. Ed. 276, 1 S. C. 512; Georgia v. Jesup, 106 U. S. 458, 27 L. Ed. 216, 1 S. C. 363; Re Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Buel v. Farmers' L. & Trust Co., 104 Fed. 839; Ex parte Cutting, 94 U. S. 14, 19, 24 L. Ed. 49; The Burns, 9 Wall. 237, 19 L. Ed. 620; Payne v. Niles, 20 How. 219, 15 L. Ed. 895; Connor v. Peugh's Lessee, 18 How. 394, 15 L. Ed. 432; Arken v. Smith, 54 Fed. 895, 4 C. C. A. 652; Bayard v. Lombard, 9 How. 530, 13 L. Ed. 245.

<sup>1</sup> Phil. Casualty Co. v. Fehheimer, 220 F. 401; Hill v. Harding, 103 U. S. 90, 26 L. Ed. 310.

<sup>2</sup> Brigham City v. Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222; Montgomery L. & W. P. Co. v. Montgomery T. Co., 219 F. 963.

<sup>3</sup> King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139; In re Kronberg, 208 F. 203.

<sup>4</sup> Orleans-Kenner Elec. Ry. Co. v. Dunbar, 218 Fed. 344; Winters v. United States 207 U. S. 564, 578, 52 L. Ed. 340, 345, 28 S. C. 207; Lamon et al v. Speer, 198 Fed. 453, C. C. A.; Alsop v. Conway, 188 Fed. 568, C. C. A.; Wilson v. Kiesel, 164 U. S. 248, 41 L. Ed. 422, 17 Sup. Ct. Rep. 124; Beardsley v. Arkansas & L. R. Co., 153 U. S. 123, 39 L. Ed. 919; Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed.

This rule is now rigidly enforced in equity causes.<sup>1</sup>

§ 6. **Separate appeal permitted where interest is separate.**

But where the interest of a party is separate from that of the other defendants or plaintiffs, he may appeal without them.<sup>2</sup>

§ 7. **Party added by order of court may ask review.**

If by any order of Court one has been made a party to the record, he may appeal or sue out a writ of error, as the nature of the case will permit.<sup>3</sup>

§ 8. **Statutory receiver of corporation may appeal.**

A statutory receiver who was not a party to the judgment may sue out a writ of error to vacate a judgment entered against the defunct corporation.<sup>4</sup>

563, 14 Sup. Ct. Rep. 693; Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76, 14 Sup. Ct. Rep. 237; Hardee v. Wilson, 146 U. S. 179, 36 L. Ed. 933, 13 Sup. Ct. Rep. 39; Dolan v. Jennings, 139 U. S. 385, 35 L. Ed. 217, 11 Sup. Ct. Rep. 584; Mason v. United States, 136 U. S. 581, 34 L. Ed. 545, 10 Sup. Ct. Rep. 1062; Estes v. Trabue, Davis & Co., 128 U. S. 225, 230, 32 L. Ed. 437, 438, 9 Sup. Ct. Rep. 58; Feibelman v. Packard, 108 U. S. 14, 27 L. Ed. 634, 1 Sup. Ct. Rep. 138; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338; Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593; Masterson v. Howard, 10 Wall. 416, 19 L. Ed. 953; Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810; Wilson v. Life & Fire Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; Owings v. Kincannon, 7 Pet. 399, 8 L. Ed. 727; Williams v. Bank of United States, 11 Wheat. 414, 6 L. Ed. 508.

<sup>1</sup> Beardsley v. Arkansas & L. Co., 158 U. S. 123, 39 L. 919, 15 S. C. 786; Winters v. U. S., 207 U. S. 564, 52 L. Ed. 340, 28 S. C. 207.

<sup>2</sup> Winters v. United States, 207 U. S. 564, 578, 52 L. Ed. 340, 345, 28 S. C. 207; Orleans Kenner Elect. Ry. Co. v. Dunbar, 218 Fed. 344, 134 C. C. A. 152; Gilfillan v. McKee, 159 U. S. 303, 40 L. Ed. 161, 16 Sup. Ct. Rep. 6; Beardsley v. Arkansas, 158 U. S. 123, 39 L. Ed. 919, 15 S. C. 786; City Natl. Bank v. Hunter, 129 U. S. 557, 32 L. Ed. 752, 9 Sup. Ct. Rep. 346; Hanrick v. Patrick, 119 U. S. 156, 30 L. Ed. 396, 7 Sup. Ct. Rep. 147; Basket v. Hassell, 107 U. S. 602, 608, 27 L. Ed. 500, 502, 2 Sup. Ct. Rep. 415; Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444; Mercantile, etc., Co. v. Kewanee, 58 Fed. 6, 7 C. C. A. 3; Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593; Germain v. Mason, 12 Wall. 259, 20 L. Ed. 392; Clifton v. Sheldon, 23 How. 481, 16 L. Ed. 429; Brewster v. Wakefield, 22 How. 118, 129, 16 L. Ed. 301, 304; Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; Todd v. Daniel, 16 Pet. 521, 523, 10 L. Ed. 1054, 1055; Cox v. U. S., 6 Peters 172, 8 L. Ed. 359.

<sup>3</sup> Tuttle v. Claffing, 88 Fed. 122; Everett C. & B. v. Alpha P. C. Co., 225 F. 931.

<sup>4</sup> Central Trust Co. of N. Y. v. Chicago R. L. & P. R. Co. 218 F. 336; Rust v. United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16.

**§ 9. Receiver cannot appeal.**

An ordinary receiver, as distinguished from a statutory receiver, is merely an officer of the Court and has no such interest in the controversy as to entitle him to an appeal.<sup>1</sup>

**§ 10. Purchaser at Judicial Sale may appeal.**

A purchaser at a judicial sale becomes a party to the record and may appeal from an order of court refusing to confirm the sale or from the order setting aside the sale.<sup>2</sup>

Bidders or purchasers at a foreclosure sale, although not parties to the suit, are entitled to appeal as to matters affecting them.<sup>3</sup>

**§ 11. Procedure for severance of record.**

Where a co-plaintiff or co-defendant refuses to join in an appeal or writ of error, the party desiring to appeal may give notice to such co-party or co-parties of his intention to appeal or sue out a writ of error and require them to appear before the judge or justice to whom the application for an appeal will be made upon the motion for an appeal or error and a severance of the record. When the order of appeal and severance is so entered, the record stands severed, and the appeal or writ of error is properly allowed to the petitioning party.<sup>4</sup>

**§ 12. Special notice unnecessary when taken in open court.**

It has been held, however, that where an appeal is prayed in open court in term time where all the parties were present or had notice, that this was equivalent to a severance of the record and

*Grier v. Union National Bank*, 217 Fed. 293.

<sup>1</sup> *Investment Co. v. Chicago, Milwaukee & E. R. Co.*, 212 Fed. 601 (C. C. A. 7th Circuit).

<sup>2</sup> *Stokes v. Williams*, 226 F. 148; *Blossom v. Milwaukee, etc., R. R. Co.*, 1 Wall. 655, 17 L. Ed. 673.

<sup>4</sup> *Winters v. United States*, 207 U. S. 564, 52 L. Ed. 340, 28 S. C. 207; *Re Key*, 189 U. S. 84, 47 L. Ed. 720, 23 S. C. 624; *Beardsley v. Arkansas & L. R. Co.*, 158 U. S. 123, 39 L. Ed. 919, 15 S. C. 786; *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. Ed. 76, 14 S. C. 237; *Falkner v. Hutchins*, 126 Fed. 363, 61 C. C. A. 425; *O'Dowd v. Russell*, 14 Wall. 403, 404, 20 L. Ed. 857. For forms see Appendix 53.

that special notice was unnecessary, but it is safer to adopt the procedure outlined in the preceding paragraph.<sup>1</sup>

**§ 13. Severance by amendment to bring in omitted parties.**

If urged in time, the appellate tribunal for good cause shown may permit an amendment of the record by allowing the omitted parties to be brought in.<sup>2</sup>

**§ 14. Waiver of severance.**

The point of want of "summons and severance" is waived by a general appearance or defense on the merits.<sup>3</sup>

(a) Where there has been no waiver the appeal or writ of error will be dismissed.<sup>4</sup>

**§ 15. When intervenors may appeal—refusing intervention.**

The general rule is that the denial of a petition to intervene is discretionary and therefore not appealable. The discretion, however, must be exercised in accordance with recognized judicial standards. There is a class of cases where the claimant's rights are finally disposed of and intervention is necessary for their protection, in which the right to intervene is absolute. Cases recognizing the existence of these two classes are<sup>5</sup>

**§ 16. Leave to appeal compelled by mandamus.**

Mandamus in the Supreme Court of the United States is

<sup>1</sup> The Bylands, 231 F. 101; *Detroit v. Guaranty Company*, 168 Fed. 608, 611, 93 C. C. A. 604.

<sup>2</sup> *Teel v. Chesapeake & O. R. R. Co.*, 204 Fed. 914 (C. C. A.); *Rininger v. Puget Sound Elec. Co.* 220 Fed. 419 (C. C. A.).

<sup>3</sup> *Amis v. Smith*, 16 Peters 303, 10 L. Ed. 973.

<sup>4</sup> *Bank v. Conly Bros. Const. Co.*, 205 Fed. 282, C. C. A., and authorities referred to in § 11 supra.

<sup>5</sup> *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 218 Fed. 336, 134 C. C. A. 146; *Credits Commutation Co. v. United States*, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; in the *Matter of Farmers' Loan & Trust Co.*, 129 U. S. 206, 32 L. Ed. 656, 9 S. C. 265; *United States v. Phillips*, 107 Fed. 824, 46 C. C. A. 660; *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234; *Farmers' Loan & Trust Co. v. Cape Fear & Yadlin Valley Ry. Co.* (C. C. A.), 71 Fed. 38; *Farmers' Loan & Trust Co. v. Northern Pacific Railway Co.* (C. C. A.), 66 Fed. 169.

the proper remedy to compel a judge to allow an appeal to an intervenor.<sup>1</sup>

**§ 17. Appeal the method of review in intervention.**

The refusal to permit an intervention is reviewable only by appeal and not by a writ of error.<sup>2</sup>

**§ 18. Intervenor may also appeal.**

(a) Where suit is dismissed as to the parties to the suit intervenor may appeal.<sup>3</sup>

(b) Parties who were allowed to intervene may appeal.<sup>4</sup>

(c) Intervenors who appeal must bring all parties into court.<sup>5</sup>

**§ 19. Persons not parties to record—when heard.**

Ordinarily only parties to the suit will be heard in an appellate tribunal, but it has been held that persons not parties to the proceedings will be given a standing on a proper showing that the decision of the case may operate prejudicial to their rights.<sup>6</sup>

**§ 20. Only those affected may assail the constitutionality of a statute.**

It is the well-settled rule of the United States Supreme Court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. They cannot complain of any injury to others.<sup>7</sup>

<sup>1</sup> St. Louis I. M. & S. Ry. Co., Bellamy, 211 F. 172; In re Farmers' Loan & Trust Co., 129 U. S. 206, 32 L. Ed. 656, 9 S. C. 265.

<sup>2</sup> Harry Bros. Co. v. Yaryan Naval S. Co., 219 Fed. 884.

<sup>3</sup> U. S. v. Dev. Co., 203 Fed. 960 (C. C. A.).

<sup>4</sup> Ex parte Jordan, 94 U. S. 248, 24 L. Ed. 123.

<sup>5</sup> Hill v. Western Elect. Co., 214 F. 243; Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563, 14 S. C. 693.

<sup>6</sup> United States v. Terminal Railroad Association, 236 U. S. 194, 59 L. Ed. 535, 35 Sup. Ct. Rep. 408.

<sup>7</sup> Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. Rep. 167, 59 L. Ed. 364; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. Ed. 1155, 34 S. C. 761; Missouri K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. Ed. 1135, 1137, 34 Sup. Ct. Rep. 678; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. Ed. 713, 719, 34 Sup. Ct. Rep. 359; Darnell v. Indiana, 226 U. S. 390, 398, 57 L. Ed. 267, 272, 33 Sup. Ct. Rep. 120; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. Ed. 212, 217, 33 Sup. Ct. Rep. 27; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co., 226 U. S. 217, 219, 57

### § 21. Who may assail state statutes.

A party cannot assail the constitutionality of a state statute on the ground that it is repugnant to the commerce clause of the Constitution of the United States and to the Acts of Congress relating to same, if the judgment under review was not based upon a claim arising out of interstate commerce.<sup>1</sup>

### § 22. Government cannot appeal or bring certiorari in criminal cases, except under criminal appeals act.

The United States cannot appeal from a judgment in a criminal case unless the appeal is expressly authorized by statute. The reasons for this rule are fully stated.<sup>2</sup>

Acting upon this principle, the Supreme Court of the United States quashed a writ of certiorari which it had previously allowed on the petition of the United States in a criminal case.<sup>3</sup>

### § 23. Suits in forma pauperis.

(a) The Statute. Sect. 1626 of the compiled statutes of United States for 1916.

"Sec. 1. That any citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to con-

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L. Ed. 193, 194, 33 Sup. Ct. Rep. 40; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. Ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Engel v. O'Malley, 219 U. S. 128, 135, 55 L. Ed. 128, 135, 31 Sup. Ct. Rep. 190; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. Ed. 868, 871, 30 Sup. Ct. Rep. 594.

<sup>1</sup> Missouri K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. Ed. 1135, 34 Sup. Ct. Rep. 678; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, ante 359, 34 Sup. Ct. Rep. 359, 58 L. Ed. 713; Farmers' & M. Sav. Bank, v. Minnesota, 232 U. S. 516, 530, ante 354, 34 Sup. Ct. Rep. 354, 58 L. Ed. 706; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. Ed. 212, 217, 33 Sup. Ct. Rep. 27; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. Ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. Ed. 868, 871, 30 Sup. Ct. Rep. 594; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 76, 52 L. Ed. 108, 109, 28 Sup. Ct. Rep. 28; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. Ed. 415, 422, 27 Sup. Ct. Rep. 188; Hooker v. Burr, 194 U. S. 415, 419, 48 L. Ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Tyler v. Judges of the Court of Registration, 179 U. S. 405, 409, 45 L. Ed. 252, 254, 21 Sup. Ct. Rep. 206.

<sup>2</sup> United States v. Sanges, 144 U. S. 310, 36 L. Ed. 445, 12 S. C. 609.

<sup>3</sup> United States v. Evans, 213 U. S. 297, 53 L. Ed. 803, 29 S. C. 507. And see "Review under the Criminal Appeals Act," also Chapter V.

clusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that, in the opinion of the court, such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court, or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action or appeal." (27 St. 252, 36 St. 866.

### Seamen's Suits.

By an amendment, Act July 1, 1916, the act was extended to seamen's suits for wages or salvage or to enforce laws made for their health or safety.

The 2d section provides for permission to proceed as a poor person after commencement of suit. The 3d governs the conduct of court officers in cases coming under the statute. The 4th authorizes the appointment by the court of an attorney to represent poor persons "if it deems the cause worthy of a trial," and empowers the court at any stage after permitting proceedings as a poor person to dismiss the suit "if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." The 5th and last section points out the manner of entering judgment concerning costs in cases under the statute.

Prior to the amendment of 1910, on the face of the statute three things were certain: (a) that the statute imposed no imperative duty to grant a request to proceed as a poor person, but merely conferred authority to do so when the fact of poverty was established and the case was found not to be frivolous; that is, was considered to be sufficiently meritorious to justify the allowance of the request; (b) that there was no power to grant such a request when made by a defendant; and (c) that there was also no authority to allow a party to proceed as a poor

person in appellate proceedings in the Supreme Court or the Circuit Courts of Appeals.<sup>1</sup>

(b) Construction of Statute.

Clarifying the 1st section as amended by these considerations, it becomes clear that the sole change operated by the amendment was to bring defendants within the statute, and to extend its provisions so as to embrace first, proceedings on application for the allowance of a writ of error or appeal to the Supreme Court and the Circuit Court of Appeals, and, second, the appellate proceedings in such courts. This being true, it is clear that as to the new subjects, the allowance of the right in those cases was made to depend upon the exercise of the same discretion as to the meritorious character of the cause to the same extent provided under the statute before amendment.<sup>2</sup>

<sup>1</sup> Kinney v. Plymouth Rock Squab Company, 236 U. S. 43, 59 L. Ed. 457, 35 S. C. 236; Bradford v. Southern R. Co., 195 U. S. 243, 49 L. Ed. 178, 25 Sup. Ct. Rep. 55.

<sup>2</sup> Kinney v. Plymouth Rock Squab Co. 236 U. S. 43, 59 L. Ed. 457, 35 S. C. 236.



## CHAPTER IV

## What Constitutes Reversible Error

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| <p>SEC.</p> <ol style="list-style-type: none"> <li>1. Reversal on error limited.</li> <li>2. On trial by jury, weight of evidence not reviewed—Remarks of the Court.</li> <li>3. Review confined to questions of law.</li> <li>4. Scope of inquiry in trial before the court. The evidence.</li> <li>5. Conclusions of law not conclusive.</li> <li>6. Review of record in Deportation and Habeas Corpus cases.</li> <li>7. Granting or refusing new trial. Refusal to entertain motion.</li> <li>8. Excluding affidavits on motion for new trial.</li> <li>9. Refusal to exercise discretion.</li> <li>10. Injury to appellant as result of error in record presumed.</li> <li>11. Reversal on court's own motion.</li> <li>12. Criminal cases. The reviewing court may notice plain error in charge without objection.</li> <li>13. Errors not jurisdictional not considered unless raised below. (a) Exception.</li> <li>14. Misjoinder must be raised below.</li> <li>15. Rulings on amendments of pleadings. (a) Not bound to follow state practice. (b) During trial.</li> <li>16. Defect in pleading must be raised below.</li> <li>17. Practice on demurrer or Motion to dismiss.</li> <li>18. Insufficiency of evidence waived by defendant by introducing evidence.</li> <li>19. When insufficiency of evidence is not waived.</li> <li>20. Objections to evidence, how made.</li> </ol> | <p>SEC.</p> <ol style="list-style-type: none"> <li>21. Objections to evidence in equity and admiralty appeals. Rule of practice.</li> <li>22. Error in excluding material evidence.</li> <li>23. Motion to withdraw case from jury—when to be made.</li> <li>24. Review of directed verdict.</li> <li>25. Error in instructing jury—Exception necessary.</li> <li>26. The Court need not follow language of requested charge.</li> <li>27. Judge may express an opinion on evidence. (a) Exception.</li> <li>28. Singling out facts prohibited.</li> <li>29. Function of trial judge in charging the jury.</li> <li>30. Verdict of guilty cannot be directed in criminal cases.</li> <li>31. Every question of fact must be submitted to jury.</li> <li>32. Reasonable interpretation of charge.</li> <li>33. Charge must be considered as a whole.</li> <li>34. Charge must be preserved in bill of exceptions.</li> <li>35. Improper comments of District Attorney—Objections thereto. (a) Good character. (b) Privilege of defendant.</li> <li>36. Excessive damages not reviewable.</li> <li>37. Criminal Verdicts. Any count sufficient to sustain.</li> <li>38. Trial before the court. Limitation of review.</li> <li>39. Common law trial without jury. Limitation of review.</li> <li>40. Findings of Referee in a common law action reviewable.</li> <li>41. Misconduct of jury.</li> </ol> |
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**§ 1. Reversal on error limited.**

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact." (Rev. Stat. of U. S., § 1011.)

**§ 2. On trial by jury, weight of evidence not reviewed—Remarks of the Court.**

Whether the verdict in a common law action was contrary to the evidence cannot be considered on review on a writ of error, if there was any evidence proper to go to the jury in support of the verdict.<sup>1</sup>

Remarks of the Court in the presence of the jury will not be reviewed unless excepted to at the time.<sup>2</sup>

**§ 3. Review confined to questions of law.**

The right to review under the above section, 1011 of the Rev. Stat. of U. S., is limited to questions of law.<sup>3</sup>

**§ 4. Scope of inquiry in trial before the court. The evidence.**

If a complete transcript of the evidence is duly preserved, the court will examine it for the purpose of determining whether the findings of the court are supported by competent evidence and, if they are not, will reverse the judgment.<sup>4</sup>

<sup>1</sup> Hoke v. U. S., 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. Reps. 281; S. Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. Ed. 170, 33 Sup. Ct. Rep. 68; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481; Crumpton v. U. S., 138 U. S. 361, 11 Sup. Ct. Rep. 355, 34 L. Ed. 958; Lancaster v. Collis, 115 U. S. 222, 6 Sup. Ct. Rep. 33, 29 L. Ed. 373; Carter v. Ruddy, 166 U. S. 493, 17 Sup. Ct. Rep. 640, 41 L. Ed. 1090; McDonald v. U. S., 63 Fed. 426; Humes v. U. S., 170 U. S. 213, 18 Sup. Ct. Rep. 602, 42 L. Ed. 1011; Turner v. New York, 168 U. S. 90, 18 Sup. Ct. Rep. 38, 42 L. Ed. 392; Rhodes v. Iowa, 170 U. S. 437, 18 Sup. Ct. Rep. 664, 42 L. Ed. 1088; Groat v. O'Hara, 154 U. S. 651, 14 Sup. Ct. Rep. 1202, 38 L. Ed. 1093; Levis v. Kengla, 169 U. S. 237, 18 Sup. Ct. Rep. 309, 42 L. Ed. 728; Streator v. Sanitary District, 133 Fed. 124, 66 C. C. A. 192; Steever v. Rickman, 154 U. S. 678, 3 Sup. Ct. Rep. 343, 27 L. Ed. 1052.

<sup>2</sup> Lane v. Lester, 237 Fed. 149.

<sup>3</sup> Union Naval Stores Co. v. United States, 240 U. S. 284, 36 Sup. Ct. Rep. 308, 60 L. Ed. 644; N. Y. Central & Hudson River R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; Ætna Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371; Walker Mfg. Co. v. Knox, 136 U. S. 339; Stevenson v. Barber, 140 U. S. 48, 11 Sup. Ct. Rep. 690, 35 L. Ed. 338; Lehnen v. Dickson, 148 U. S. 73; 13 Sup. Ct. Rep. 481, 37 L. Ed. 373.

<sup>4</sup> Saling v. Bollander, 125 Fed. 704, 60 C. C. A. 472; Conners v. U. S., 141 Fed. 18, 72 C. C. A. 275; Collier v. U. S., 173 U. S. 79, 19 Sup. Ct. Rep. 330, 43 L. Ed. 621;

**§ 5. Conclusions of law not conclusive.**

But conclusions of law interwoven with questions of fact are not conclusive upon the reviewing court.<sup>1</sup>

**§ 6. Review of record in deportation and habeas corpus cases.**

The record will be reviewed in deportation cases of Chinese laborers for the purpose of ascertaining whether it contains competent evidence to sustain the order.<sup>2</sup> And for the same purpose the evidence will also be reviewed in habeas corpus cases.<sup>3</sup>

**§ 7. Granting or refusing new trial. Refusal to entertain motion.**

The granting or denial of a motion for new trial rests very largely in the judicial discretion of the trial court, and it is not ordinarily reviewable upon writ of error.<sup>4</sup>

But where the court refuses to *entertain* and consider and pass upon the matters urged by a defeated party as grounds for a new trial error may be assigned.<sup>5</sup>

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Lang v. Rigney, 160 U. S. 531, 40 L. Ed. 525, 16 Sup. Ct. Rep. 366; King v. Smith, 110 Fed. 98, 49 C. C. A. 49; U. S. v. Bishop, 125 Fed. 183, 60 C. C. A. 125; Phoenix Insurance Co. v. Kerr, 129 Fed. 724, 64 C. C. A. 252.

<sup>1</sup> Mason v. U. S., 219 Fed. 547; The Britannia v. Cleugh, 153 U. S. 130, 14 Sup. Ct. Rep. 795, 38 L. Ed. 660.

<sup>2</sup> Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. Rep. 2, 60 L. Ed. 114; Tom Hong v. U. S., 193 U. S. 517, 24 Sup. Ct. Rep. 517, 48 L. Ed. 772; In re United States, 194 U. S. 194, 24 Sup. Ct. Rep. 629, 48 L. Ed. 931.

<sup>3</sup> Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658, 34 L. Ed. 55; Tang v. U. S., 140 U. S. 677, 11 Sup. Ct. Rep. 1018, 35 L. Ed. 603; In re Morrissey, 137 U. S. 158, 11 Sup. Ct. Rep. 57, 34 L. Ed. 645.

<sup>4</sup> Smith v. U. S., 219 Fed. 25; McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. Rep. 783, 59 L. Ed. 1300; Humes v. U. S., 170 U. S. 213, 18 Sup. Ct. Rep. 602, 42 L. Ed. 1011; Newcomb v. Wood, 97 U. S. 581-583, 24 L. Ed. 1085; Mattox v. United States, 146 U. S. 140-146, 13 Sup. Ct. 50, 36 L. Ed. 917; Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Holder v. United States, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; Clune v. United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

<sup>5</sup> Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. Ed. 917; Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321; Benedetto v. Reno Collar Co., 216 Fed. 143 (C. C. A. 7th Cir.).

**§ 8. Excluding affidavits on motion for new trial.**

The exclusion of affidavits on a motion for new trial may be assigned as error where due exception is taken.<sup>1</sup>

**§ 9. Refusal to exercise discretion.**

Where the court refuses to exercise a lawful discretion in a case, error may be assigned.<sup>2</sup>

**§ 10. Injury to appellant as result of error in record presumed.**

An error in the record is presumptively injurious to the party against whom it was committed, unless it appears beyond a doubt that the error did not and could not prejudice the right of the party.<sup>3</sup>

**§ 11. Reversal on court's own motion.**

The reviewing court may of its own motion reverse a decree in equity and direct further proofs to be taken to avoid a gross injustice.<sup>4</sup>

**§ 12. Criminal cases—the reviewing court may notice plain error in charge without objection.**

In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception.<sup>5</sup>

<sup>1</sup> *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. Ed. 917; *Smith v. U. S.*, 219 Fed. 25.

<sup>2</sup> *Rosaly, widow of Rarbaumer v. Frazier*, 227 U. S. 584, 33 Sup. Ct. Rep. 333, 57 L. Ed. 655; *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40 L. Ed. 436.

<sup>3</sup> *Kanawha & Mich. R. R. Co. v. Kerse*, 239 U. S. 576, 36 Sup. Ct. Rep. 174, 60 L. Ed. 448; *Williams v. U. S.*, 158 Fed. 30; *Vicksburg R. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118, 30 L. Ed. 299; *Nat. Biscuit Co. v. Nolan*, 138 Fed. 9; *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. Rep. 919, 38 L. Ed. 841; *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. Rep. 394, 39 L. Ed. 481.

<sup>4</sup> *Chicag. Junction R. R. Co. v. King*, 222 U. S. 222, 32 Sup. Ct. Rep. 79, 56 L. Ed. 173; *Holden v. Circleville L. & P. Co.*, 216 Fed. 490; *Barber v. Coit*, 118 Fed. 272, 55 C. C. A. 145.

<sup>5</sup> *Crawford v. United States*, 212 U. S. 183, 53 L. Ed. 465; *Clyatt v. United States*, 197 U. S. 207, 25 Sup. Ct. Rep. 429, 49 L. Ed. 726; *Wiborg v. United States*, 163

**§ 13. Errors not jurisdictional not considered unless raised below.**

It is the settled law in the national appellate tribunals that errors not involving anything fundamental or jurisdictional which were not presented to the consideration of the lower courts will be regarded as waived and will be passed without further notice.<sup>1</sup>

(a) Legal issues other than those specifically presented for determination may properly be considered and decided by an Appellate Court where they naturally arise and are pertinent to the questions at issue and to further proceedings in the trial court.<sup>2</sup>

**§ 14. Misjoinder must be raised below.**

The point of misjoinder of parties or causes of action, if not urged in the trial court, will not be considered on review.<sup>3</sup>

**§ 15. Rulings on amendments of pleadings.**

It has uniformly been held that the allowance or refusal of leave to amend pleadings in actions at law is discretionary with the trial court, and that its action is not reviewable except in case of gross abuse of discretion.<sup>4</sup>

(a) Nor is the Federal Court bound to follow the practice prevailing in the State Court upon the question of allowing amendments.<sup>5</sup>

(b) In the absence of abuse of discretion, the Appellate Court

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U.S. 633, 16 Sup. Ct. Rep. 1127, 1197, 41 L. Ed. 289; *Williams v. United States*, 158 Fed. 30; *Weems v. United States*, 217 U. S. 349, 54 L. Ed. 793.

<sup>1</sup> *Magruder v. Drury*, 235 U. S. 106, 35 Sup. Ct. Rep. 77, 59 L. Ed. 151; *Montana R. R. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96, 34 L. Ed. 681; *Gila Valley G. & N. R. R. v. Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229, 58 L. Ed. 521.

<sup>2</sup> *Phil. Casualty Co. v. Fechheimer*, 220 Fed. 401, *Collin County Natl. Bank v. Hughes*, 155 Fed. 389, 83 C. C. A. 661; *Guaranty Trust Co. v. Koehler*, 195 Fed. 669.

<sup>3</sup> *Historical Pub. Co. v. Jones Bros. Pub. Co.*, 231 Fed. 638.

<sup>4</sup> *Lieburg v. Matthews*, 216 Fed. 1; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426, 32 L. Ed. 800; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; *Montana Mining Co. v. St. Louis Min. & Mill Co.*, 78 C. C. A. 33, 147 Fed. 897; *Lange v. Union Pac. R. Co.*, 62 C. C. A. 48, 126 Fed. 338; *Dunn v. Mayo Mills*, 67 C. C. A. 450, 134 Fed. 804; *Truckee River Gen. Elec. Co. v. Benner*, 211 Fed. 79 (C. C. A.).

<sup>5</sup> *Truckee River Gen. Elec. Co. v. Benner*, 211 Fed. 80 (C. C. A.).

will not reverse a cause for failure to grant or refuse leave to amend a pleading during the trial.<sup>1</sup>

**§ 16. Defect in pleading must be raised below.**

Unless the court's attention has been specially called to a defective pleading, an appellate tribunal will not notice the alleged error on appeal.<sup>2</sup>

**§ 17. Practice on demurrer or motion to dismiss.**

The Appellate Court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and it cannot look into anything otherwise presented, such as the files and records in another case, or any other proceedings in any court for the purpose of determining the questions arising on the demurrers to the bill.<sup>3</sup>

This practice by analogy is undoubtedly the same under the new equity rules abolishing demurrers and substituting in lieu thereof a motion to dismiss.

**§ 18. Insufficiency of evidence waived by defendant by introducing evidence.**

The point that evidence of the plaintiff or prosecution was insufficient to justify the court in submitting the cause to the jury is waived by the introduction of evidence for the defendant.<sup>4</sup>

**§ 19. When insufficiency of evidence is not waived.**

But such waiver does not affect the right of defendant to have the sufficiency in law of the entire evidence considered

<sup>1</sup> Incorporated Town of Stonewall v. Stone, 207 Fed. 540 (C. C. A.).

<sup>2</sup> Geo. A. Fuller Co. v. McCloskey, 228 U. S. 194, 33 Sup. Ct. Rep. 471, 57 L. Ed. 795.

<sup>3</sup> Ward Baking Co. v. Weber Bros., 230 Fed. 142; Chicago Great Western R. R. Co. v. Le Valley, 233 Fed. 384; Pacific R. R. Co. v. Missouri Pacific Ry. Co., 111 U. S. 505, 4 Sup. Ct. Rep. 583, 28 L. Ed. 498; Richardson v. Loree, 94 Fed. 375 (C. C. A. 5th Cir.).

<sup>4</sup> Accident Ins. Co. v. Crandall, 120 U. S. 527, 7 Sup. Ct. Rep. 685, 30 L. Ed. 740, 530; Kasle v. U. S., 233 Fed. 878 (C. C. A.); Sandals v. United States, 213 Fed. 571; Tucker v. U. S., 224 Fed. 833, 140 C. C. A. 279; Gould v. United States, 209 Fed. 730; Simpson v. United States, 184 Fed. 817; Leyer v. United States, 183 Fed. 102; Burton v. United States, 142 Fed. 57; Goldman v. United States, 220 Fed. 57; Ciyatt v. United States, 197 U. S. 207, 25 Sup. Ct. Rep. 429, 49 L. Ed. 720.

upon the motion to direct a verdict made at the close of all the testimony.<sup>1</sup>

### § 20. Objections to evidence—how made.

The rule is that the party objecting to the introduction of evidence must state specifically his objection thereto and that a general objection is insufficient. This rule, however, has no application where the impropriety of the evidence is manifest.<sup>2</sup>

### § 21. Objections to evidence in equity and admiralty appeals.

#### Rule of practice.

Rule 13 of the general rules of the U. S. Supreme Court provides:

“In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.”

Identical with Rule 12 of the U. S. Circuit Court of Appeals for the 2d Circuit. The rule in all other Circuits is the same.

### § 22. Error in excluding material evidence.

Where it clearly appears from the record that the evidence offered and excluded was competent and of such materiality and weight that its exclusion might have caused injury to the party offering the same, nothing further or more formal is required.<sup>3</sup>

### § 23. Motion to withdraw case from jury—when to be made.

If assignments of error are to be based upon the legal sufficiency of the evidence to support a verdict, motions to that end must be made at the conclusion of the evidence and exceptions preserved to adverse rulings thereon.<sup>4</sup>

<sup>1</sup> *Kasle v. United States*, 233 Fed. 878 (C. C. A. 6th Cir.); *Tucker v. United States*, 224 Fed. 833, 837, 140 C. C. A. 279 (C. C. A. 6th Cir.).

<sup>2</sup> *Grandison v. Robertson* (C. C. A. 2d Cir.), 231 Fed. 785.

<sup>3</sup> *Atchison, T. & S. F. Ry. Co. v. Phipps* (C. C. A.), 125 Fed. 478-480, 60 C. C. A. 314; *Briggs v. Chicago & N. W. Ry. Co.* (C. C. A.), 125 Fed. 745, 60 C. C. A. 513; *Owl Creek Coal Co. v. Goleb*, 210 Fed. 209.

<sup>4</sup> *Mexico International Land Co. v. Larkin*, 195 Fed. 495; *Missouri Pac. Ry. Co. v. Chicago & Alton R. R. Co.*, 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309; *Potter v.*

**§ 24. Review of directed verdict.**

Where a motion for a directed verdict is interposed by both parties to the litigation, the case becomes one of law for the court to decide. By making such a motion the parties waive the right to a verdict by the jury.<sup>1</sup>

The question presented in a national appellate court on a challenge of a refusal to direct a verdict is not whether or not there is any evidence to sustain the verdict rendered. It is (1) whether or not there was substantial evidence to sustain that verdict, and (2) whether or not the evidence in support of the verdict requested was so conclusive that in the exercise of a sound judicial discretion the court should not sustain a contrary verdict. It is the duty of the trial court to direct a verdict at the close of a trial when the evidence is undisputed and when, upon a question of fact, it is so clearly preponderant or of such a conclusive character that the court would be bound in the exercise of a sound judicial discretion to set aside the verdict in opposition to it.<sup>2</sup>

The improbability of plaintiff's story is a question of fact for the jury. The appellate tribunal on review of a denial of motion to direct verdict cannot determine questions of credibility of witnesses, and must take that view of the evidence most favorable to the party against whom the direction is asked.<sup>3</sup>

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U. S., 122 Fed. 49; *Condran v. Chicago, Milwaukee & St. Paul Ry. Co.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; *Bidwell v. Douglas Trading Co.*, 183 Fed. 93, 105 C. C. A. 385; *McBride v. Neal*, 214 Fed. 966, 969 (C. C. A.).

<sup>1</sup> *Stratton's Independence v. Howbert*, 207 Fed. 419 (C. C. A.).

<sup>2</sup> *Canadian North Ry. Co. v. Senske*, 201 Fed. 637, 644, 120 C. C. A. 65, 72; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *Union Pacific R. R. Co. v. McDonald*, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; *Delaware, Lackawanna & Western R. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Patillo v. Allen-West Commission Co.*, 131 Fed. 680, 686, 65 C. C. A. 508, 514; *Chicago Great Western Ry. Co. v. Roddy*, 131 Fed. 712, 713, 65 C. C. A. 470, 471; *Woodward v. Chicago, Milwaukee & St. Paul Ry. Co.*, 145 Fed. 577, 578, 75 C. C. A. 591, 592; *Missouri Pacific Ry. Co. v. Oleson*, 213 Fed. 330.

<sup>3</sup> *Erie R. R. Co. v. Weber & Kraft*, 207 Fed. 293 (C. C. A. 1, 125 C. C. A. 37); *L. & N. R. R. Co. v. Bell*, 206 Fed. 395 (C. C. A.); *Worthington v. Elmer*, 207 Fed. 308 (C. C. A.); *Big Brushy Coal Co. v. Williams* (C. C. A. 6th Cir.), 176 Fed. 529,



In considering the question whether there has been error in refusing a directed verdict for the defendant in a criminal trial, the reviewing court can inquire only whether there was any evidence to sustain the verdict.<sup>1</sup>

**§ 25. Error in instructing jury—exception necessary.**

An erroneous charge to the jury is ground for reversal. But, unless specific exceptions were taken before the jury retired, assignment of error as to the propriety of the charge will be disregarded.<sup>2</sup> A construction on a written instrument placed by the Court in his charge to the jury will not be reviewed unless a request to charge the jury a certain way has been made by the party complaining of the charge.<sup>3</sup>

**§ 26. The court need not follow language of requested charge.**

The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language.<sup>4</sup>

**§ 27. Judge may express an opinion on evidence.**

In the courts of the United States, as in the courts of England, from which our practice was derived, the judge, in submitting the case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, where no rule of law is incorrectly stated, and all matters of fact are ultimately sub-

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532, 99 C. C. A. 102; *Lake Shore Elect. Co. v. Kurtz*, 218 Fed. 165 (C. C. A. 6th Cir.); *Sowles v. Norcross Bros. Co.*, 195 Fed. 889 (C. C. A.).

<sup>1</sup> *Hedderly v. United States*, 193 Fed. 561, 114 C. C. A. 227; *Boren v. United States*, 144 Fed. 801, 75 C. C. A. 531; *Cohen v. United States*, 214 Fed. 23 (C. C. A. 23); *Crumpton v. United States*, 138 U. S. 363, 11 Sup. Ct. Rep. 355, 34 L. Ed. 958.

<sup>2</sup> *Fisher Mach. Co. v. Dougherty*, 231 Fed. 910 (C. C. A.).

<sup>3</sup> *Alverson v. Oregon R. R. Co. & Nav. Co.*, 236 Fed. 340.

<sup>4</sup> *Blanton v. U. S.*, 213 Fed. 320; *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. Rep. 235, 41 L. Ed. 624; *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641, 28 L. Ed. 1093; *Grand Trunk v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36 L. Ed. 485.

mitted to the determination of the jury, cannot be reviewed on writ of error.<sup>1</sup>

(a) But this rule is subject to the qualification that the trial judge must not usurp the functions of a jury.<sup>2</sup>

The following language used by Judge Hook in *Rudd v. United States*, 173 Fed. 914, 97 C. C. A. 462, was approved in the *Sandals* case, *supra*:

"We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."<sup>3</sup>

The Court should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province.<sup>4</sup>

### § 28. Singling out facts prohibited.

An instruction must not single out and declare the effect of certain facts without consideration of other modifying facts.<sup>5</sup>

### § 29. Function of trial judge in charging the jury.

Judge Sprague in *United States v. 1363 Bags of Merchandise*, 2 Spr. 85, Fed. Cas. No. 15,964, in language approved by the Supreme Court of the United States in *Capital Traction Co. v.*

<sup>1</sup> *Smith v. St. Louis*, 214 Fed. 737; *Young v. Carrigan*, 210 Fed. 442; *Smith v. United States*, 157 Fed. 721; *United States v. Reading Ry.*, 123 U. S. 113, 8 Sup. Ct. Rep. 77, 31 L. Ed. 138.

<sup>2</sup> *Sandals v. United States*, 213 Fed. 569 (C. C. A.).

<sup>3</sup> See, also, *Sandals v. U. S.*, 213 Fed. 569; *Hickory v. United States*, 160 U. S. 408, 424, 425, 16 Sup. Ct. 327, 40 L. Ed. 474 (opinion by the present Mr. Chief Justice White); *Mullen v. United States*, 106 Fed. 892, 895, 46 C. C. A. 22 (C. C. A. 6th Cir., opinion by the present Mr. Justice Day); *Foster v. United States*, 188 Fed. 305, 308, 310, 110 C. C. A. 283 (C. C. A. 4th Cir.).

<sup>4</sup> *Sandals v. U. S.*, 213 Fed. 569; *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. Rep. 919, 38 L. Ed. 841.

<sup>5</sup> *Perovich v. United States*, 205 U. S. 87, 27 Sup. Ct. Rep. 456, 51 L. Ed. 722.

Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, speaks of this as follows:

"The Constitution secures a trial by jury without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial."<sup>1</sup>

### § 30. Verdict of guilty cannot be directed in criminal cases.

It is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged.<sup>2</sup>

### § 31 Every question of fact must be submitted to jury.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues. The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory; and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts, and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting on

<sup>1</sup> Approved in 208 Fed. 438.

<sup>2</sup> *Stow v. U. S.*, 213 Fed. 25; *Sparf and Hansen v. United States*, 156 U. S. 51, 15 Sup. Ct. Rep. 273, 39 L. Ed. 343.

those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice may determine the result.<sup>1</sup>

### § 32. Reasonable interpretation of charge.

Instructions given by the court at the trial are entitled to a reasonable interpretation, and if the proposition as stated is not erroneous they are not as a general rule to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party. Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained. Requests for such a purpose may be made at the close of the charge, to call the attention of the judge to the supposed error, inaccuracy or ambiguity of expression; and where nothing of the kind is done the judgment will not be reversed, unless the court is of the opinion that the jury were misled or wrongly directed.<sup>2</sup>

### § 33. Charge must be considered as a whole.

Each portion of the charge to the jury must be considered in its relation to the entire charge.<sup>3</sup>

### § 34. Charge must be preserved in bill of exceptions.

The giving and refusing of instructions cannot be reviewed unless the evidence is preserved by a bill of exceptions.<sup>4</sup>

<sup>1</sup> U. S. v. Oppenheim, 228 Fed. 220; Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Knight v. Illinois Central, 180 Fed. 372.

<sup>2</sup> United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 35 Sup. Ct. Rep. 298, 59 L. Ed. 696; Phil. Cas. Co. v. Fechheimer, 220 Fed. 401; Spring Co. v. Edgar, 99 U. S. 659, 25 L. Ed. 487; Castle v. Bullard, 23 How. 172, 189, 16 L. Ed. 424; Carver v. Jackson, 4 Pet. 1, 80, 7 L. Ed. 761; Allis v. United States, 155 U. S. 117, 121, 15 Sup. Ct. Rep. 36, 39 L. Ed. 91; Beaver v. Taylor, et al., 93 U. S. 46, 55, 23 L. Ed. 797.

<sup>3</sup> MacKenzie v. U., S. 209 Fed. 289; White v. Van Horn, 159 U. S. 3, 19, 15 Sup. Ct. Rep. 1027, 40 L. Ed. 55.

<sup>4</sup> Duluth St. Ry. Co. v. Speaks, 204 Fed. 573, 123 C. C. A. 99; Robinson v. Stearns, 204 Fed. 772, 123 C. C. A. 222; Cooper River Ry. Co. v. Reeder, 211 Fed. 280, 127 C. C. A. 648.

**§ 35. Improper comments of district attorney—objections thereto.**

It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks of the district attorney which are not fully justified by evidence, and request its interposition; and, in case of refusal, to note an exception. It must appear, however, that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused.<sup>1</sup>

(a) The defendant is entitled to a legal presumption that his character is good. Where the defendant failed to offer any evidence as to his good character it is improper for the district attorney to appeal to the jury to assume that the defendant's character is bad because he failed to prove the contrary.<sup>2</sup>

(b) The rule that the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on, in the event he does not become a witness in his own behalf, is universal.<sup>3</sup>

**§ 36. Excessive damages not reviewable.**

The correction of an excessive verdict is a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the Federal appellate courts.<sup>4</sup>

**§ 37. Criminal verdicts—any count sufficient to sustain.**

It is settled law that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is

<sup>1</sup> Odell Mfg. Co. v. Tebbets, 212 Fed. 652; Higgins v. United States, 185 Fed. 710; Chadwick v. United States, 141 Fed. 225; Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. Rep. 355, 34 L. Ed. 958; Lowden v. United States, 149 Fed. 673; Williams v. United States, 168 U. S. 382; 18 Sup. Ct. Rep. 92, 42 L. Ed. 509.

<sup>2</sup> Smith v. U. S., 231 Fed. 35; Lowden v. United States, 149 Fed. 673; Higgins v. United States, 185 Fed. 710; Demmick v. United States, 121 Fed. 638.

<sup>3</sup> Diggs v. United States, 220 Fed. 545; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. Rep. 644, 40 L. Ed. 819; United States v. Wetmore, 218 Fed. 237.

<sup>4</sup> Erie R. R. Co. v. Winter, 143 U. S. 61, 12 Sup. Ct. 356, 36 L. Ed. 71; Fitch v. Huff, 218 Fed. 17; Chesapeake & O. Ry. Co. v. Proffett, 218 Fed. 23 (C. C. A. 4th Cir.); Northern Pacific R. R. Co. v. Charles, 51 Fed. 562, 2 C. C. A. 380.

good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.<sup>1</sup>

The Federal courts have repudiated the technical doctrine of inconsistency and repugnancy in verdicts. In theory of law each count charges a distinct substantive offense, and the finding of the jury as to a particular count is independent of and unaffected by the finding upon any other count.<sup>2</sup>

If the gravamen of the charge in each count, on which there has been a verdict of guilty, is the same, there is no inconsistency in the verdict. If in contemplation of law, the legal effect of the allegations in the various counts on which there has been a verdict of guilty is the same, the courts will not upset the verdict on the ground of inconsistency, where the only inconsistency is in respect to immaterial particulars concerning the means by which the crime was committed.<sup>3</sup>

### § 38. Trial before the court—limitation of review.

The Revised Statutes provided as to the Circuit Courts as follows:

"Sec. 648. The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy."

"Sec. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court, upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

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<sup>1</sup> *Classen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. Rep. 169, 35 L. Ed. 966; *Botsford v. U. S.*, 215 Fed. 510 (C. C. A.); *Evans v. United States*, 153 U. S. 584, 595, 14 Sup. Ct. 934, 38 L. Ed. 830; *Hocking Valley Ry. Co. v. United States*, 210 Fed. 735, 740 (C. C. A. 6th Cir.); *Wesoky v. United States*, 175 Fed. 333, 334, 99 C. C. A. 121 (C. C. A. 3d Cir.); *United States v. Lair*, 195 Fed. 47, 50, 115 C. C. A. 49 (C. C. A. 8th Cir.); *Greene v. United States*, 154 Fed. 401, 410, 85 C. C. A. 251 (C. C. A. 5th Cir.).

<sup>2</sup> *Walsh v. United States*, 174 Fed. 615, 620; *Flickinger v. United States*, 150 Fed. 1, 4, 6, 7; *Harvey v. United States*, 159 Fed. 419.

<sup>3</sup> *Walsh v. United States*, 174 Fed. 615, 620; *Flickinger v. United States*, 150 Fed. 1.

By Section 291 of the Judicial Code, the above sections apply to the District Courts.<sup>1</sup>

The review is limited to errors of law made during the trial and to the ascertainment whether the record contains any evidence to support the findings.<sup>2</sup>

### § 39. Common law trial without jury—limitation of review.

The decisions of a court in the trial of an action at law without a jury upon the weight of conflicting evidence are not reviewable in the national courts.<sup>3</sup>

Where a case is tried by a judge, the findings of fact by a court are conclusive, *unless there was no evidence to support them*.<sup>4</sup>

It is a rule so well settled as not to require the citation of authority that, when an action at law is tried by a court upon a written waiver of a jury, the sufficiency of the evidence to support the judgment will not be reviewed by an appellate court in the absence of a request by the complaining party at the close of the evidence for a finding or judgment in his favor or special findings by the trial court of the facts established. An opinion of the trial judge analyzing the facts cannot be taken as a special finding.<sup>5</sup>

### § 40. Findings of referee in a common law action reviewable.

It was at one time questioned whether there could be a review in an appellate court of the United States where the facts were found by a referee (*Boogher v. Insurance Co.*, 103 U. S. 90, 95, 26 L. Ed. 310), but it is now settled that when a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported or as modified by it, the question whether the judgment rendered was warranted by

<sup>1</sup> *Nashville Interurban Ry. Co. v. Barnum*, 212 Fed. 634.

<sup>2</sup> *Nashville Interurban Ry. Co. v. Barnum*, 212 Fed. 634; *Wilson v. Pauly*, 72 Fed. 129.

<sup>3</sup> *Gibson v. Luther*, 196 Fed. 203, 204, 116 C. C. A. 35, 36; *Busch v. Stromberg Telephone Co.*, 217 Fed. 330 (C. C. A.).

<sup>4</sup> *Hathaway v. First Natl. Bank*, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

<sup>5</sup> *Keeley v. Ophir Hill, etc., Co.*, 95 C. C. A. 96, 169 Fed. 598; *Tiernan v. Chicago Life Ins. Co.*, 214 Fed. 241.

the facts found will be reviewed by the appellate court as though the findings were wholly made by the trial court itself.<sup>1</sup>

In the *Board of Commissioners v. Sherwood*, 11 C. C. A. 505, 64 Fed. 103, the court said:

"The record shows that the circuit court 'adopted each finding of fact made by the referee as findings of fact made by the court,' and in view of that statement we have treated the case precisely as if it came to this court on a special finding of facts made by the trial court. *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310. The questions open for review on the writ of error that has been sued out are those, and none other, which might have been reviewed if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had made a special finding of the facts."

When the trial court has referred a cause to a referee instead of trying it itself, it is important in determining its power over the subsequent proceedings to know whether the reference was at common law or was under the local practice of the State where the court was held.

In *Dundee Mortgage Co. v. Hughes*, 124 U. S. 157, 160, 8 Sup. Ct. 377, 378 (31 L. Ed. 357) it was said:

"It is undoubtedly true that under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject, and, if the report be set aside, the cause stands for trial the same as if it had never been referred."

On the other hand, State statutes have frequently been regarded as the source of authority for references of actions at law.<sup>2</sup>

When there is a written waiver of a jury, and the cause has been referred to a referee under the authority of a State statute, the referee and the trial court should thereafter follow the local

<sup>1</sup> *C. M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 364, 20 Sup. Ct. 924, 44 L. Ed. 1099.

<sup>2</sup> *United Kansas Cement Co. v. Harvey*, 216 Fed. 316; *Boatmen's Bank v. Trower Bros. Co.*, 104 C. C. A. 314, 181 Fed. 804; *Dietz v. Lymer*, 10 C. C. A. 71, 61 Fed. 792, on rehearing, 11 C. C. A. 410, 63 Fed. 758; *United States v. Ramsey* (C. C. A.), 158 Fed. 488; *Dundee Mortgage Co. v. Hughes*, *supra*.



practice and modes of proceeding "as near as may be" in accordance with the Conformity Act as generally construed.<sup>1</sup>

### § 41. Misconduct of jury.

In *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. Ed. 917, it was shown by affidavits that, after the cause was submitted to the jury, a paper printed and published in the city where the trial occurred, commenting on the trial and unfavorably upon the defendant, was introduced into the jury room, and was read by them. The court excluded the affidavits and the paper read by the jury, and refused to consider them. This was held sufficient to warrant a review, upon errors assigned, of the action of the trial court; and the misconduct to be such as to warrant a new trial.<sup>2</sup>

<sup>1</sup> *United States v. Ramsey*, 158 Fed. 488, ante; *Tiernan v. Chicago Life Ins. Co.* 214 Fed. 241.

<sup>2</sup> See also *Smith v. U. S.*, 231 Fed. 25; *Felton v. Spiro*, 78 Fed. 576, 581, 582, 24 C. C. A. 321.

## CHAPTER V

## Appeals and Writs of Error from U. S. District Court Direct to U. S. Supreme Court

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| <p>SEC.</p> <ol style="list-style-type: none"> <li>1. Statutory provision: § 238 Federal Judicial Code.</li> <li>2. CLAUSE I. Jurisdiction of the Court in issue.</li> <li>3. Jurisdictional amount not required.</li> <li>4. "Jurisdiction of Court in issue" means its jurisdiction as a Federal Court.</li> <li>5. Definition of Jurisdiction by Mr. Justice Holmes.</li> <li>6. Mere challenge of jurisdiction not sufficient.</li> <li>7. Jurisdictional claim by reason of illegal service of process.</li> <li>8. Affidavits attached to plea of jurisdiction considered on appeal.</li> <li>9. Challenging jurisdiction as Court of Equity insufficient.</li> <li>10. Question of venue reviewable.</li> <li>11. Dismissal of bankruptcy proceedings for lack of jurisdiction reviewable.</li> <li>12. Jurisdictional issue as understood by the parties.</li> <li>13. In capital cases, character of crime is test of jurisdiction.</li> <li>14. Orders in arrest cases not reviewable.</li> <li>15. When dismissal order in interstate commerce case reviewable.</li> <li>16. When no question of jurisdiction certified, not reviewable.</li> <li>17. When Supreme Court will review the whole case.</li> <li>18. Necessity of certifying jurisdictional question.</li> </ol> | <p>SEC.</p> <ol style="list-style-type: none"> <li>19. Mode of certification.</li> <li>20. What is a sufficient certification.</li> <li>21. When certificate not required.</li> <li>22. When decree is equivalent to certificate.</li> <li>23. Time to issue certificate.</li> <li>24. CLAUSE II. Prize causes reviewable.</li> <li>25. Amendments permitted.</li> <li>26. Judgment or decree on review.</li> <li>27. CLAUSE III. When constitutional questions are reviewed exclusively by the Supreme Court.</li> <li>28. Substantial constitutional question a jurisdictional prerequisite.</li> <li>29. When optional to appeal to Supreme Court or Court of Appeals.</li> <li>30. Cross-appeals.</li> <li>31. Specific constitutional question must appear from plaintiff's statement of claim.</li> <li>32. Facts and law must be well pleaded.</li> <li>33. Defendant may raise constitutional question by answer.</li> <li>34. Entire case and every question will be reviewed.</li> <li>35. Constitutional question arising during trial.</li> <li>36. When constitutional question has been decided pending appeal. Jurisdiction retained on other branches of case.</li> <li>37. Frivolous constitutional questions.</li> <li>38. CLAUSE IV. Construction of Federal treaties direct to Supreme Court.</li> </ol> |
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- | SEC.  | SEC.  |
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| 39. Issue must be raised in court below.  | 46. Cannot restrain public officer from constitutional act.                             |
| 40. Non-resident alien may raise question.  | 47. Supreme Court on review may determine every question.                               |
| 41. <b>CLAUSE V.</b> When state constitution or law is contrary to U. S. Constitution, direct appeal lies.  | 48. Can review action of State Public Utilities Commission.                             |
| 42. <b>INTERLOCUTORY INJUNCTIONS.</b> Jurisdiction of the Supreme Court on direct appeal under the Act of March 4, 1913, restricting the issuance. The Statute. | 49. When injunction was refused.  |
| 43. Appeals from interlocutory injunctions in Interstate Commerce cases under Act of October 22, 1913.  | 50. <b>CRIMINAL APPEALS ACT.</b> Jurisdiction of Supreme Court on appeal by government. |
| 44. Jurisdiction of Supreme Court under said act.   | 51. Limitation of review.   |
| 45. Applies to order by Administrative Board or Commission.   | 52. Indictment bad in law not reviewable.   |
|   | 53. Misconstruction of statute reviewable.  |
|   | 54. Construction of indictment by court below.  |

### § 1. Statutory provision: § 238. Federal Judicial Code.

Section 238 of the Federal Judicial Code provides:

"Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; (2) from the final sentences and decrees in prize causes; (3) in any case that involves the construction or application of the Constitution of the United States; (4) in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and (5) in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." (36 Stat. L. 1157).<sup>2</sup>

### § 2. **CLAUSE I: Jurisdiction of the Court in issue.**

"Giving the Act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit [district] court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) if the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits,

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<sup>2</sup>This Section is a reenactment of Section 5 of March 3, 1891, known as the Circuit Court of Appeals Act.

the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where if the question of jurisdiction arises the circuit court of appeals may certify it; (3) if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court; (4) if in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) the same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits.”<sup>2</sup>

### § 3. Jurisdictional amount not required.

A direct appeal may be taken to the Supreme Court of the U. S. from the District Court on a jurisdictional question regardless of the jurisdictional amount.

“That in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals except as provided in the next following section.” (25 Stat. L. 693.) Act of Feb. 25, 1889.<sup>3</sup>

### § 4. “The jurisdiction of the court in issue” means its jurisdiction as a Federal Court.

In order to bring the case on a direct appeal or writ of error to the U. S. Supreme Court under the first clause of Sect. 238 of the Judicial Code, it must appear from the record that the

<sup>2</sup> U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. Rep. 39, 39 L. Ed. 87.

<sup>3</sup> For other cases where jurisdictional amount is not required, see Chapter IX, § 6, Chapter VII, § 12, Chapter VIII, § 17, and Chapter X, § 2A.

jurisdiction of the court was challenged *as a Federal Court* and not merely as a Court of Equity or a Court of Law.\*

### § 5. Definition of jurisdiction by Mr. Justice Holmes.

In the recent case of *Lamar v. United States*, 240 U. S. 64, 36 Sup. Ct. Rep. 255, 60 L. Ed. 526, Mr. Justice Holmes made the following observation relating to jurisdiction of the U. S. District Court as a Federal Court, which would fall within the meaning of Clause 1 of Sect. 238 of the Federal Judicial Code:

“On the matter of jurisdiction it is said that when the controversy concerns a subject limited by *Federal Law*, such as bankruptcy, *Grant Shoe Co. v. Laird*, 212 U. S. 445, 29 Sup. Ct. Rep. 345, 53 L. Ed. 591; patents, *Healy v. Sea Gull Specialty Co.*, 237 U. S. 479, 35 Sup. Ct. Rep. 658, 59 L. Ed. 1056, or admiralty, *The Jefferson*, 215 U. S. 130, 30 Sup. Ct. Rep. 54, 54 L. Ed. 125, the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the court. *The Ira M. Hedges*, 218 U. S. 264, 270, 31 Sup. Ct. Rep. 17, 54 L. Ed. 1039. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. Rep. 525, 50 L. Ed. 867. Jurisdiction is a matter of power and covers wrong as well as right decisions. *Fauntleroy v. Lum*, 210 U. S. 230, 234, 235, 28 Sup. Ct. Rep. 641, 52 L. Ed. 1039. *Burnet v. Desmornes*, 226 U. S. 145, 147, 33 Sup. Ct. Rep. 63, 57 L. Ed. 159. There may be instances in which it is hard to say whether a law goes to the power or only to the duty of the court.”

\* *Louisville & N. R. Co. v. Western Union Teleg. Co.*, 234 U. S. 369, 34 Sup. Ct. Rep. 810, 58 L. Ed. 1356; *Farrugia v. Philadelphia & Reading Ry. Co.*, 233 U. S. 352, 34 Sup. Ct. Rep. 589, 58 L. Ed. 996; *Ferguson v. Omaha & S. W. R. Co.*, 227 Fed. 513; *Chase v. Wetzlar*, 225 U. S. 79, 83, 56 L. Ed. 990, 991, 32 Sup. Ct. Rep. 659; *United States v. Congress Const. Co.*, 222 U. S. 199, 56 L. Ed. 173, 32 Sup. Ct. Rep. 44; *Rogers v. Hennepin County, et al.*, 220 Fed. 453; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 55 L. Ed. 163, 31 Sup. Ct. Rep. 185; *Courtney v. Pradt*, 196 U. S. 89, 49 L. Ed. 398, 25 Sup. Ct. Rep. 208; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. Ed. 159, 24 Sup. Ct. Rep. 119; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. Ed. 783, 19 Sup. Ct. Rep. 497; *Alton Water Co. v. Brown*, 166 Fed. 840, C. C. A., certiorari denied, 212 U. S. 581; *Smith v. McKay*, 161 U. S. 355, 40 L. Ed. 731, 16 Sup. Ct. Rep. 490; *Crawford v. McCarthy*, 148 Fed. 198, C. C. A.

**§ 6. Mere challenge of jurisdiction not sufficient.**

The mere challenge of the jurisdiction of the court over the subject-matter and the person does not raise the question of jurisdiction of the court as a Federal Court which gives the right of direct appeal.<sup>1</sup>

**§ 7. Jurisdictional claim by reason of illegal service of process.**

But in the very recent case of *Merriam v. Saalfeld*, 241 U. S. 22, 36 Sup. Ct. Rep. 477, 60 L. Ed. 868, it was held that a direct appeal to the Supreme Court of U. S. will lie to test the jurisdiction of the court over the person of the defendant obtained by an illegal service of process.

**§ 8. Affidavits attached to plea of jurisdiction considered on appeal.**

Affidavits attached to a plea of jurisdiction, whether read to the court or not, will be considered by the United States Supreme Court.<sup>2</sup>

**§ 9. Challenging jurisdiction as court of equity insufficient.**

Whether, upon the showing in the bill, the appellant is entitled to the relief sought, is not a jurisdictional question in the sense of Clause 1 of Section 238.<sup>3</sup>

Where a corporation being named as a co-defendant objects to the jurisdiction of the U. S. District Court and the court holds that the objection is well taken, the question whether or not the suit may be maintained under the general equity jurisdiction of the court against the other defendants is not a question of Federal jurisdiction within the meaning of Section 238 of

<sup>1</sup> *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. Ed. 169, 24 Sup. Ct. Rep. 119; *Smith v. McKay*, 161 U. S. 335, 40 L. Ed. 731, 16 Sup. Ct. Rep. 490; *Crawford v. McCarthy*, 148 Fed. 198.

<sup>2</sup> *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 446, 30 Sup. Ct. Rep. 125, 54 L. Ed. 272.

<sup>3</sup> *Louisville & N. R. Co. v. Western Union Teleg. Co.*, 234 U. S. 369, 34 Sup. Ct. Rep. 810, 58 L. Ed. 1356; *Darnell v. Illinois Central R. R. Co.*, 225 U. S. 243, 56 L. Ed. 1072, 32 Sup. Ct. Rep. 760; *Citizens' Sav. & Trust Co. v. Illinois Central R. R. Co.*, et al., 205 U. S. 46, 58, 51 L. Ed. 703, 707, 27 Sup. Ct. Rep. 425; *Smith v. McKay*, 161 U. S. 335, 40 L. Ed. 731, 16 Sup. Ct. Rep. 490.

the Judicial Code, and does not challenge the jurisdiction of the court as a Federal court.<sup>1</sup>

### § 10. Questions of venue reviewable.

Questions relating to the venue, where the right to object has not been waived by a general appearance, may be reviewed under this clause.<sup>2</sup>

### § 11. Dismissal of bankruptcy proceedings for lack of jurisdiction reviewable.

Where a District Court dismisses a bankruptcy proceeding for want of jurisdiction, same may be reviewed by a direct writ of error to the Supreme Court of U. S.<sup>3</sup>

### § 12. Jurisdictional issue as understood by the parties.

Where the issue of jurisdiction is plainly marked and is so understood and treated by the parties and the District Court, a direct appeal lies from the judgment of dismissal to the Supreme Court.<sup>4</sup>

### § 13. In capital cases, character of crime is test of jurisdiction.

The test of jurisdiction of the Supreme Court in capital cases is the character of the crime charged and not the punishment actually imposed by the District Court. If a death penalty might have been inflicted, then the jurisdiction of the U. S. Supreme Court is complete.<sup>5</sup>

### § 14. Orders in arrest cases not reviewable.

An appeal from an order of arrest alleged to have been made for want of jurisdiction cannot be taken under this section.<sup>6</sup>

<sup>1</sup> Geneva Furniture Co. v. Karpen & Bros., 238 U. S. 254, 260, 59 L. Ed. 1295, 35 Sup. Ct. Rep. 788; Bogart v. Southern Pacific Co., 228 U. S. 137, 33 Sup. Ct. Rep. 497, 57 L. Ed. 768.

<sup>2</sup> Male v. Atchison Ry. Co., 240 U. S. 97, 36 Sup. Ct. Rep. 351, 60 L. Ed. 544; Davidson Bros. Marble Co. v. Gibson, 213 U. S. 10, 29 Sup. Ct. Rep. 324, 53 L. Ed. 675.

<sup>3</sup> Park v. Cameron, 237 U. S. 616, 59 L. Ed. 1147, 35 Sup. Ct. Rep. 719; Shoe Co. v. Laird Co., 212 U. S. 445, 29 Sup. Ct. Rep. 332, 53 L. Ed. 591.

<sup>4</sup> Bryant Co. v. New York Steamfitting Co., 235 U. S. 327, 59 L. Ed. 253, 35 Sup. Ct. Rep. 108.

<sup>5</sup> Fitzpatrick v. United States, 178 U. S. 304, 44 L. Ed. 1078, 20 Sup. Ct. Rep. 744.

<sup>6</sup> Carey v. Railway Co., 150 U. S. 170, 37 L. Ed. 1041, 14 Sup. Ct. Rep. 63; Ex parte Lennon, 150 U. S. 393, 37 L. Ed. 1120, 14 Sup. Ct. Rep. 123.

**§ 15. When dismissal order in interstate commerce case reviewable.**

When a District Court dismisses a suit of a shipper against a railroad company for damages on the ground that no action on the claim was obtained from the Interstate Commerce Commission, a question of jurisdiction of the District Court within the meaning of Clause 1 is presented.<sup>1</sup>

**§ 16. When no question of jurisdiction certified, not reviewable.**

A direct appeal from the District Court to the Supreme Court of U. S. does not lie where no question of jurisdiction was certified to and where the jurisdiction of the court as a Federal Court was not at issue.<sup>2</sup>

**§ 17. When Supreme Court will review the whole case.**

It is only when the issue in the trial court was limited to the question of jurisdiction and that question was certified to U. S. Supreme Court, that the review will be confined to the single question of jurisdiction, but where there was no attempt to make a separate issue on the question of jurisdiction or to take an appeal upon that question alone, the Supreme Court will review the entire case, if the record presents a substantial constitutional question.<sup>3</sup>

**§ 18. Necessity of certifying jurisdictional question.**

The general rule is that in order to confer jurisdiction upon the Supreme Court of the U. S. under the first clause of Sect. 238, the trial court must certify the question of jurisdiction and thereupon the review will be limited to the question of jurisdiction only.<sup>4</sup>

<sup>1</sup> Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. Rep. 916.

<sup>2</sup> First National Bank v. Klug, 186 U. S. 203, 46 L. Ed. 1127, 22 Sup. Ct. Rep. 899; Lucius v. Coleman Co., 196 U. S. 149, 49 L. Ed. 425, 25 Sup. Ct. Rep. 214.

<sup>3</sup> Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. Ed. 396, 36 Sup. Ct. Rep. 206; Chappelle v. United States, 160 U. S. 499, 40 L. Ed. 510, 16 Sup. Ct. Rep. 397.

<sup>4</sup> Gilbert v. David, 235 U. S. 561, 59 L. Ed. 360, 35 Sup. Ct. Rep. 164; Bryant v. New York Steamfitting Co., 235 U. S. 327, 59 L. Ed. 253, 35 Sup. Ct. Rep. 108;



### § 19. Mode of certification.

In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below.<sup>1</sup>

It is sufficient if there is a plain declaration that the single matter which is by the record sent up for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. The record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction.<sup>2</sup>

### § 20. What is a sufficient certification.

Where the record shows that the only matter tried and decided was a demurrer to the plea of jurisdiction and the petition for the writ of error asked only for a review on the sole ground that the court had no jurisdiction, held sufficiently certified.<sup>3</sup>

A recital in the bill of exceptions held sufficient.<sup>4</sup>

A recital in the order allowing the appeal that it is granted "solely upon the question of jurisdiction" sufficient.<sup>5</sup>

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Louisville & N. R. Co. v. Western Union Teleg. Co., 234 U. S. 369, 34 Sup. Ct. Rep. 810, 58 L. Ed. 1356; *Apapas v. United States*, 233 U. S. 587, 34 Sup. Ct. Rep. 699, 58 L. Ed. 1104; *Courtney v. Pradt*, 196 U. S. 89, 25 Sup. Ct. Rep. 208, 49 L. Ed. 398; *Chappelle v. United States*, 160 U. S. 499, 40 L. Ed. 510, 16 Sup. Ct. Rep. 397; *Ansbro v. United States*, 159 U. S. 695, 40 L. Ed. 310, 16 Sup. Ct. Rep. 187; *Colvin v. City of Jacksonville*, 157 U. S. 368, 39 L. Ed. 736, 15 Sup. Ct. Rep. 634; *Davis & Rankin Building & Mfg. Co. v. Barber*, 157 U. S. 673, 39 L. Ed. 853, 15 Sup. Ct. Rep. 719, 60 Fed. 465; *Maynard v. Hecht*, 151 U. S. 324, 38 L. Ed. 179, 14 Sup. Ct. Rep. 353.

<sup>1</sup> *Arkansas v. Schlirenholz*, 179 U. S. 598, 45 L. Ed. 335, 21 Sup. Ct. Rep. 229.

<sup>2</sup> *Shields v. Coleman*, 157 U. S. 168, 176, 39 L. Ed. 660, 15 Sup. Ct. Rep. 570.

<sup>3</sup> *Shields v. Coleman*, 157 U. S. 168, 39 L. Ed. 660, 15 Sup. Ct. Rep. 570; *Re Lehigh Mining & Mfg. Co.*, 156 U. S. 322, 39 L. Ed. 438, 15 Sup. Ct. Rep. 375.

<sup>4</sup> *Re Lehigh Mining & Mfg. Co.*, 156 U. S. 322, 39 L. Ed. 438, 15 Sup. Ct. Rep. 375.

<sup>5</sup> *Shields v. Coleman*, 157 U. S. 168, 39 L. Ed. 660, 15 Sup. Ct. Rep. 570.

*McAllister v. Cheesepeake & O. R. R. Co.*, decided by U. S. Supreme Court on March 6, 1917, *Advance Sheets No. 10*, p. 274; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 272, 46 L. ed. 910, 22 Sup. Ct. Rep. 681.

**§ 21. When certificate is not required.**

A certificate of the trial judge is not required when the record distinctly and unequivocally shows that the case in the court below turned upon the single question of jurisdiction.<sup>1</sup>

**§ 22. When decree is equivalent to certificate.**

Where the decree shows on its face that the suit was dismissed for want of jurisdiction, it takes the place of a certificate within the requirements of the act.<sup>2</sup>

**§ 23. Time to issue certificate.**

The jurisdictional certificate must be issued during the term in which the case was decided.<sup>3</sup>

But where the certificate is supplied by a decree in due form, showing dismissal for want of jurisdiction only, the appeal may be perfected subsequently within two years, as are other appeals.<sup>4</sup>

**§ 24. CLAUSE II. Prize causes reviewable.**

In appeals from the final sentences and decrees in prize causes the Supreme Court is the proper tribunal to which the appeal should be taken. On such appeals, the Supreme Court has authority to review without a certificate of the district court and regardless of the amount involved.<sup>5</sup>

<sup>1</sup>The Fair v. Kohler, 228 U. S. 22, 33 Sup. Ct. Rep. 410, 57 L. Ed. 716; Scott v. Donald, 165 U. S. 58, 71, 41 L. Ed. 632, 17 Sup. Ct. Rep. 265; Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 40 L. Ed. 401, 16 Sup. Ct. Rep. 272; Re Lehigh Mining & Mfg. Co., 156 U. S. 322, 39 L. Ed. 438, 15 Sup. Ct. Rep. 570; Carey v. Houston & Texas Cent. Ry., 150 U. S. 170, 181, 37 L. Ed. 1041, 14 Sup. Ct. Rep. 63.

<sup>2</sup>Herndon-Carter Co. v. Norris, 224 U. S. 496, 32 Sup. Ct. Rep. 550, 56 L. Ed. 857; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910, 30 Sup. Ct. Rep. 125.

<sup>3</sup>Colvin v. City of Jacksonville, 158 U. S. 456, 39 L. Ed. 1053, 15 Sup. Ct. Rep. 866; The Bayonne, 159 U. S. 687, 40 L. Ed. 306, 16 Sup. Ct. Rep. 185.

<sup>4</sup>Herndon-Carter Co. v. Norris, 224 U. S. 496, 32 Sup. Ct. Rep. 550, 56 L. Ed. 857; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910, 30 Sup. Ct. Rep. 125. McAllister v. Cheaspeake & O. R. R. Co., decided March 6, 1917.

<sup>5</sup>Eastern Extension, Australasia & China Telegraph Co., Ltd., v. United States, 231 U. S. 326, 34 Sup. Ct. Rep. 57, 58 L. Ed. 250; The Paquete Habana, 175 U. S. 677, 880, 20 Sup. Ct. Rep. 290, 44 L. Ed. 320; The Adula, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505.

### § 25. Amendments permitted.

"The Supreme Court may, if in its judgment the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes." (Rev. Stat. Sect. 1006.)

### § 26. Judgment or decree on review.

"The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon." (Rev. Stat. of U. S. § 701.)

### § 27. CLAUSE III. When constitutional questions are reviewed exclusively by the Supreme Court.

When no diversity of citizenship exists and the sole ground of the jurisdiction of the U. S. District Court is a claim or privilege under the Constitution of the U. S., an appeal or writ of error must be taken directly to the U. S. Supreme Court and not to the U. S. Circuit Court of Appeals, the jurisdiction of the Supreme Court being exclusive.<sup>1</sup>

### § 28. Substantial constitutional question a jurisdictional prerequisite.

But in order that jurisdiction of the Supreme Court of U. S. can be maintained it must appear on the record that the suit really and substantially involves a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States.<sup>2</sup>

<sup>1</sup> Carolina Glass Co. v. Carolina, 240 U. S. 305, 36 Sup. Ct. Rep. 293, 60 L. Ed. 658; American Sug. Ref. Co. v. City of New Orleans, 181 U. S. 277, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646; Collins v. Board of Control, 219 Fed. 885, C. C. A. 5th Circuit; Union and Planters' Bank v. Memphis, 189 U. S. 71, 73, 23 Sup. Ct. Rep. 604, 47 L. Ed. 712; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 22 Sup. Ct. Rep. 452, 46 L. Ed. 546; Chappelle v. United States, 160 U. S. 499, 509, 40 L. Ed. 510, 16 Sup. Ct. Rep. 397.

<sup>2</sup> Western Union Teleg. Co. v. Ann Arbor R. R. Co., 178 U. S. 237, 244 44, L. Ed. 1052, 1054, 20 Sup. Ct. Rep. 867; Little York Gold Washing & Water Co. v.

### § 29. When optional to appeal to the U. S. Supreme Court or U. S. Court of Appeals.

But when the jurisdiction of the District Court rests on diversity of citizenship and the case as made by the issues involves constitutional and other questions, the appeal or writ of error may be taken either to the U. S. Supreme Court or the U. S. Circuit Court of Appeals.<sup>1</sup>

The law is well settled that where the jurisdiction of the District Court depends solely on diverse citizenship, and it turns out later that the case also involves the construction or application of the Constitution of the United States, or the constitutionality of a law of the United States, or the validity or construction of a treaty is drawn in question, or the constitution or law of a state is claimed to be in contravention of the Constitution of the United States, the Circuit Court of Appeals may certify the constitutional or treaty question to the Supreme Court and proceed as thereupon advised, *or may decide the whole case*; but the mere fact that in such a case one or more of the constitutional questions referred to in Clause 3 may have so arisen that a direct resort to the Supreme Court of the United States might be had does not deprive the Court of Appeals of jurisdiction, or justify it in declining to exercise it.<sup>2</sup>

### § 30. Cross-appeals.

Under Clause 3, cross-appeals may be taken directly to the Supreme Court of the U. S. upon every question in the case.<sup>3</sup>

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Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222.

<sup>1</sup> Huguley Mfg. Co. v. Galetton Cotton Mills, 184 U. S. 290, 296, 46 L. Ed. 546, 22 Sup. Ct. Rep. 452; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 283, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646; Loeb v. Columbia Twp. Co., 179 U. S. 472, 45 L. Ed. 280, 21 Sup. Ct. Rep. 174.

<sup>2</sup> Bagley v. General Fire Ext. Co., 212 U. S. 447, 29 Sup. Ct. Rep. 341, 53 L. Ed. 605; McFadden v. U. S. 288, 29 Sup. Ct. Rep. 490, 53 L. Ed. 801; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 283, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646.

<sup>3</sup> Field v. Barber Asphalt Paving Co., 194 U. S. 618, 621, 48 L. Ed. 1142, 24 Sup. Ct. Rep. 784.

**§ 31. Specific constitutional question must appear from plaintiff's statement of claim.**

In order to sustain the jurisdiction of the Supreme Court under Clause 3, it is indispensable that plaintiff's statement of his cause of action, whether by a bill of complaint in equity or declaration in an action at law, should be based specifically upon the Constitution or laws of the United States. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and that defense is invalidated by some provision of the Constitution of the United States.<sup>1</sup>

A request for ruling on a constitutional point is necessary to authorize a review.<sup>2</sup>

**§ 32. Facts and law must be well pleaded.**

A suit does not arise under the Constitution of the U. S. unless the facts and the law are well pleaded in legal and logical form. A mere statement that a certain act violates the Federal Constitution is insufficient.<sup>3</sup>

**§ 33. Defendant may raise constitutional question by answer.**

A Federal question may be raised by the defendant in his answer.<sup>4</sup>

**§ 34. Entire case and every question will be reviewed.**

Where a case is brought to the Supreme Court of U. S. because a constitutional question is involved, the entire case and

<sup>1</sup> *Louisville & N. R. R. Co. v. Moteley*, 211 U. S. 149, 154, 29 Sup. Ct. Rep. 42, 53 L. Ed. 126; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 46 L. Ed. 546, 22 Sup. Ct. Rep. 452; *Tennessee v. Union Planters' Bank*, 152 U. S. 454, 38 L. Ed. 511, 14 Sup. Ct. Rep. 654; *Spreckels Sug. Ref. Co. v. McClain*, 192 U. S. 397, 24 Sup. Ct. Rep. 376, 48 L. Ed. 496; *Boston & M. Consolidated Min. Copper & Mining Co. v. Montana Ore. Purch. Co.*, 188 U. S. 632, 23 Sup. Ct. Rep. 434, 47 L. Ed. 626.

<sup>2</sup> *Cornel v. Green*, 163 U. S. 75, 16 Sup. Ct. Rep. 969, 41 L. Ed. 76; *Richard v. Michigan*, 186 U. S. 479, 22 Sup. Ct. Rep. 942, 46 L. Ed. 1259.

<sup>3</sup> *Arbuckel v. Blackburn*, 191 U. S. 405, 408, 48 L. Ed. 239, 241, 24 Sup. Ct. Rep. 148; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. Ed. 140, 24 Sup. Ct. Rep. 63.

<sup>4</sup> *Loeb v. Columbia Twp. Co.*, 179 U. S. 472, 45 L. Ed. 280, 21 Sup. Ct. Rep. 174.

every question therein properly preserved and duly assigned as error will be considered.<sup>1</sup>

**§ 35. Constitutional question arising during trial.**

Where the District Court properly obtains jurisdiction because of the diversity of citizenship, and during the course of the trial a constitutional question within the meaning of this section comes up, the appeal can be taken directly to the Supreme Court, which court may render judgment on every proposition involved in the case.<sup>2</sup>

**§ 36. When constitutional question has been decided pending appeal. Jurisdiction retained on other branches of case.**

Where a case is taken to the Supreme Court by reason of a constitutional question involved in the case, the fact that the question is decided adversely in another case pending the termination of the appeal will not oust the Supreme Court of jurisdiction. And the rule has been laid down broadly that even though the constitutional question since the suing out of the writ of error

<sup>1</sup> Louisville & N. R. Co. v. Western Union Teleg. Co., 234 U. S. 369, 34 Sup. Ct. Rep. 810, 58 L. Ed. 1356; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. Rep. 493, 58 L. Ed. 974; Boisé Artesian H. & C. Water Co. v. Boisé City, 230 U. S. 84, 91, 33 Sup. Ct. Rep. 997, 57 L. Ed. 1400; Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. Rep. 192, 57 L. Ed. 417; Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 Sup. Ct. Rep. 451, 53 L. Ed. 753; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. Ed. 195, 29 Sup. Ct. Rep. 101; Fayerweather v. Ritch, 195 U. S. 276, 49 L. Ed. 193, 25 Sup. Ct. Rep. 58; Fields v. Barber Asphalt Paving Co., 194 U. S. 618, 621, 48 L. Ed. 1142, 24 Sup. Ct. Rep. 784; National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216, 46 L. Ed. 157, 22 Sup. Ct. Rep. 111; Loeb v. Columbia Twp Co., 179 U. S. 472, 473, 45 L. Ed. 280, 21 Sup. Ct. Rep. 174; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43; Holder v. Aultman Miller & Co., 169 U. S. 81, 42 L. Ed. 669, 18 Sup. Ct. Rep. 269; Penn. Mut. Life Ins. Co. v. Austin, 168 U. S. 685, 42 L. Ed. 626, 18 Sup. Ct. Rep. 233; Scott v. Donald, 165 U. S. 53, 41 L. Ed. 632, 17 Sup. Ct. Rep. 265, and cases cited; Horner v. United States, 143 U. S. 570, 36 L. Ed. 266, 12 Sup. Ct. Rep. 522.

<sup>2</sup> Siler v. Louisville & N. R. Co., 213 U. S. 175, 176, 53 L. Ed. 753, 29 Sup. Ct. Rep. 451; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. Ed. 314, 23 Sup. Ct. Rep. 196; Huguley Mfg. Co. v. Galetton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546, 22 Sup. Ct. Rep. 452.

has become a mere abstraction, the duty rests upon the Supreme Court to review the case upon other assignments of error.<sup>1</sup>

### § 37. Frivolous constitutional questions.

If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face, or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudications of the Supreme Court of the United States, then the appeal will be dismissed.<sup>2</sup>

Where the constitutional point is without any merit and is a mere pretext put forward in order to open other questions that otherwise could not be reviewed by the Supreme Court of the U. S., the writ of error or appeal will be dismissed for want of jurisdiction.<sup>3</sup>

### § 38. CLAUSE IV.—Construction of Federal treaties—direct to Supreme Court.

Where it is necessary to construe and apply Federal treaties, an appeal or writ of error lies directly from the Supreme Court of U. S. to the District Court.<sup>4</sup>

<sup>1</sup> *Wilson v. United States*, 232 U. S. 563, 34 Sup. Ct. Rep. 347, 58 L. Ed. 728; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. Rep. 163, 52 L. Ed. 278; *Burton v. United States*, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rep. 243; *Horner v. United States*, 143 U. S. 570, 36 L. Ed. 266, 12 Sup. Ct. Rep. 522.

<sup>2</sup> *Merriam Co. v. Syndicate Pub. Co.*, 237 U. S. 618, 59 L. Ed. 1148, 35 Sup. Ct. Rep. 708; *Toop v. Ulysses Land Co.*, 237 U. S. 580, 35 Sup. Ct. Rep. 739, 59 L. Ed. 1127; *Brolan v. United States*, 236 U. S. 216, 35 Sup. Ct. Rep. 285, 59 L. Ed. 544; *De Bearn v. Safe Deposit & Trust Co.*, 233 U. S. 24, 34 Sup. Ct. Rep. 584, 58 L. Ed. 833; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 576, 48 L. Ed. 795, 799, 24 Sup. Ct. Rep. 553; *Sawyer v. Piper*, 189 U. S. 154, 158, 47 L. Ed. 757, 23 Sup. Ct. Rep. 633; *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 311, 47 L. Ed. 190, 192, 23 Sup. Ct. Rep. 123; *Lampasas v. Bell*, 180 U. S. 276, 21 Sup. Ct. Rep. 368, 284, 45 L. Ed. 527.

<sup>3</sup> *United Surety Co. v. American Fruit Product Co.*, 238 U. S. 140, 35 Sup. Ct. Rep. 828, 59 L. Ed. 1238.

<sup>4</sup> *Johnson v. Gerald*, 234 U. S. 422, 34 Sup. Ct. Rep. 794, 58 L. Ed. 1383; *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. Ed. 283, 35 Sup. Ct. Rep. 127.

**§ 39. Issue must be raised in court below.**

In order to obtain a review under this section, the record must show that a definite issue was made in relation to a treaty in the court below.<sup>1</sup>

**§ 40. Non-resident alien may raise question.**

Where, in an action under the Employers' Liability Act, a defense was interposed that the action cannot be maintained by a non-resident alien, and the plaintiff relied upon certain treaties to offset this defense, a case within the meaning of Clause 4 was presented reviewable on direct appeal to the Supreme Court.<sup>2</sup>

**§ 41. CLAUSE V.—When State constitution or law is contrary to U. S. Constitution, direct appeal lies.**

In any case in which the constitution or law of a state is claimed to be in contravention to the Constitution of the United States, an appeal direct to the Supreme Court of the United States will lie.<sup>3</sup>

**§ 42. Interlocutory Injunctions. Jurisdiction of the Supreme Court on direct appeal under the Act of March 4, 1913, restricting the issuance. The statute.**

Section 266 of the Federal Judicial Code, as amended, is as follows:

"Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of

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<sup>1</sup> *Cincinnati H. & D. R. R. Co. v. Thiebaud*, 177 U. S. 615, 44 L. Ed. 911, 20 Sup. Ct. Rep. 822.

<sup>2</sup> *McGovern v. Philadelphia R. R. Co.*, 235 U. S. 389, 35 Sup. Ct. Rep. 133, 59 L. Ed. 283.

<sup>3</sup> *Wilson v. United States*, 232 U. S. 563, 24 Sup. Ct. Rept. 347, 55 L. ed. 828, *Myles Salt Co. v. Drainage District*, 239 U. S. 478, 36 Sc. 204, 60 L. 392, and see Act of Sept. 6, 1916, page 134 of this book. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. Rep. 101, 53 L. Ed. 195; *Press Publishing Co. v. Monroe*, 164 U. S. 105, 41 L. Ed. 367, 17 Sup. Ct. Rep. 40; *Chappelle v. United States*, 160 U. S. 499, 40 L. Ed. 510, 16 Sup. Ct. Rep. 397; *Horner v. United States*, 143 U. S. 570, 46 L. Ed. 266, 12 Sup. Ct. Rep. 522.



such State, shall be issued or granted by any Justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by, any circuit judge acting as district judge, upon the ground of unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith." (37 Stat. L. 1013.)

### § 43. Appeals from interlocutory injunctions in Interstate Commerce cases under Act of October 22, 1913.

#### Jurisdiction of U. S. Supreme Court:

. . . The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act

to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven (1887) as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten (1910), is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the In-

terstate Commerce Commission, to the Attorney-General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney-General, allow a temporary stay or suspension, whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. *An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused;* and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney-General of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen (1913), and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or upon failure of said petitioners to act in the premises within thirty days after the

passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney-General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

All laws or part of laws inconsistent with the foregoing provisions relating to the Commerce Court are repealed. (38 Stat. L. 219.)

#### § 44. Jurisdiction of Supreme Court under said act.

The Supreme Court has jurisdiction over causes arising under this Act.<sup>1</sup>

#### § 45. Applies to order by administrative board or commission.

Section 266 of the Judicial Code, as amended by Act of March 4, 1913, applies to orders by administrative boards or commissions, and an application for an interlocutory injunction suspending or restraining the enforcement of any such order made by such board or commission must be made to a Federal judge, and shall be heard and determined by three judges, of whom at least one must be a justice of the U. S. Supreme Court or a circuit judge, and the other two may be either circuit or district judges.<sup>2</sup>

<sup>1</sup> Louisville & Nashville R. Co. v. United States, 238 U. S. 1, 35 Sup. Ct. Rep. 696, 59 L. Ed. 1177.

<sup>2</sup> Louisville & Nashville R. R. Co. v. Railroad Commission, 208 Federal, 35; Nolen v. Reichman, 225 Fed. 812; Trenton & Mercer Co. Traction Corp. v. Inhabitants of City of Trenton, 227 Fed. 502; Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

**§ 46. Cannot restrain public officer where act is constitutional.**

Where, however, the injunction sought is merely for the purpose of restraining some public officer from doing something under an act which is admitted to be constitutional, this section does not apply.<sup>1</sup>

**§ 47. Supreme Court on review may determine every question.**

Because of the Federal questions raised, the District Court in the first instance and the Supreme Court of U. S. on review may determine every question in the case, local as well as Federal.<sup>2</sup>

**§ 48. Can review action of State Public Utilities Commission.**

A State Public Utilities Commission is not a court and its action may be reviewed under the above statute in the Federal Court.<sup>3</sup>

**§ 49. When injunction was refused.**

Where no opportunity has been given to test the result of the operation ordinance, and the company earned six per cent on its capital, an injunction was refused.<sup>4</sup>

**§ 50. CRIMINAL APPEALS ACT. Jurisdiction of the Supreme Court on appeals by government.**

The jurisdiction of the Supreme Court of the United States to review criminal cases on appeal by the government is conferred by the Criminal Appeals Act, 34 Statutes at Large, Chapter 2564, page 1246.

**§ 51. Limitation of review.**

It is settled that under that Act the Supreme Court has no authority to revise the mere interpretation of an indictment. The review is confined solely to the ascertainment whether the

<sup>1</sup> Lykins v. Chesapeake & Ohio Ry. Co., 209 Fed. 573, 126 C. C. A. 395.

<sup>2</sup> Louisville & N. R. R. Co. v. Garrett, 231 U. S. 298, 320, 34 Sup. Ct. Rep. 48, 58 L. Ed. 229.

<sup>3</sup> Bacon v. Rutland R. R. Co., 232 U. S. 134, 34 Sup. Ct. Rep. 283, 58 L. Ed. 538; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. Rep. 67, 53 L. Ed. 150, 160.

<sup>4</sup> Des Moines Car Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. Rep. 829, 59 L. Ed. 1244.

court below erroneously construed the statute under which the indictment was founded.<sup>1</sup>

**§ 52. Indictment bad in law not reviewable.**

Accordingly it has been held that where a demurrer to an indictment was quashed because the counts contained therein were "bad in law" the Supreme Court of the United States was without jurisdiction to review the judgment on appeal by the government.<sup>2</sup>

**§ 53. Misconstruction of statute reviewable.**

A direct appeal by the government lies to the Supreme Court of the U. S. from a judgment dismissing an indictment where the Court misconstrues the statute upon which it was founded or overlooks its existence.<sup>3</sup>

**§ 54. Construction of indictment by court below.**

The limitations upon the jurisdiction of the Supreme Court of the United States under the Criminal Appeals Act are such that it must accept the construction placed upon the counts of the indictment by the District Court, and its review is limited to the consideration whether the acts charged in the indictment are condemned as criminal by the statute.<sup>4</sup>

<sup>1</sup> United States v. Carter, 231 U. S. 492, 34 Sup. Ct. Rep. 173, 58 L. Ed. 330; United States v. Stevenson, 215 U. S. 190, 196, 30 Sup. Ct. Rep. 35, 54 L. Ed. 153; United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. Rep. 123, 53 L. Ed. 230.

<sup>2</sup> United States v. Carter, John H., 231 U. S. 492, 34 Sup. Ct. Rep. 173, 58 L. Ed. 330.

<sup>3</sup> United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. Rep. 49, 59 L. Ed. 207; United States v. Portale, 235 U. S. 27, 35 Sup. Ct. Rep. 1, 59 L. Ed. 111; United States v. Foster, 233 U. S. 515, 34 Sup. Ct. Rep. 666, 58 L. Ed. 1074.

<sup>4</sup> U. S. v. Barnow, 239 U. S. 74, 36 Sup. Ct. Rep. 19, 60 L. Ed. 155; United States v. Patten, 226 U. S. 525, 535, 33 Sup. Ct. Rep. 141, 57 L. Ed. 333, 338.

## CHAPTER VI

## Jurisdiction of the Circuit Court of Appeals of the United States

Sec.

1. Statutory provision. § 128 Federal Judicial Code defines powers and jurisdiction and includes:
  - (a) Patents.
  - (b) Trademarks.
  - (c) Copyrights.
  - (d) Revenue.
  - (e) Criminal.
  - (f) Admiralty.
2. Court of Appeals has no jurisdiction when jurisdiction of court below was only question in issue.
3. When Court of Appeals has jurisdiction when other questions are involved.
4. Question of excess of authority of trial court reviewable in Court of Appeals.
5. Power to issue writs of prohibition and mandamus in aid of appellate jurisdiction.
6. When jurisdiction attaches.
7. **BANKRUPTCY.** Jurisdiction of the Circuit Court of Appeals. Statutory provisions.
8. Review and revise.
9. By appeal in ten days.
10. Decision in the above causes final, but may be reviewed by certiorari.
11. Construction of Sections 23, 24, and 25 of the Bankruptcy Act.
12. Care should be taken in selecting mode of review.
13. Section 24b. Distinction between § 24b and controversies in bankruptcy.
14. Time to bring petition to revise.

Sec.

15. Remedies exclusive.
16. Petition to revise must assign error of law.
17. When petition to revise used.
18. Decrees must have definiteness and finality.
19. Evidence may be reviewed.
20. Only questions of law reviewable by petition to revise.
21. How to review election of trustee.
22. Appeals under § 25, Clause 3, Bankruptcy Act.
23. When review is by appeal. Intervention.
24. Plenary suits and summary proceedings.
25. Test of summary jurisdiction.
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### § 1. Statutory provision, § 128 Federal Judicial Code, defines powers and jurisdiction.

Sec. 128 of the Judicial Code, as amended January 15, 1915, provides:

“The Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty the judgments and decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, (amended by adding trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases).”

Under this statute all cases of the classes enumerated therein go to the U. S. Court of Appeals. There is a class of cases in which the Court of Appeals has concurrent jurisdiction with the



Supreme Court. In other cases the jurisdiction of the Court of Appeals is exclusive.<sup>1</sup>

**§ 2. Court of Appeals has no jurisdiction when jurisdiction of court below was only question in issue.**

The U. S. Circuit Court of Appeals for the 2d Circuit in the case of *Tyler Co. v. Ludlow-Saylor Co.*, 212 Fed. 155, dismissed an appeal for want of jurisdiction where the question below turned solely upon the question of jurisdiction of the court, holding that under Sect. 238 of the Federal Judicial Code the appeal should have been taken to the U. S. Supreme Court.<sup>2</sup>

(a) Where the question involved was the jurisdiction of the court over a foreign corporation, it has been held that the U. S. Court of Appeals has jurisdiction.<sup>3</sup>

**§ 3. When Court of Appeals has jurisdiction when other questions are involved.**

When the question of jurisdiction and *other* questions of controlling importance are involved, and there is no certificate by the trial court that the sole question below was the jurisdiction of the court as a Federal court, the Circuit Court of Appeals will entertain jurisdiction of the whole case.<sup>4</sup>

**§ 4. Question of excess of authority of trial court reviewable in Court of Appeals.**

Where the claim is made that the trial court had jurisdiction over the action, but that it exceeded its authority in extending the scope of the inquiry or proceeding, an appeal lies only to the Circuit Court of Appeals.<sup>5</sup>

And this is true where it is established that the District Court

<sup>1</sup> See "Certiorari."

<sup>2</sup> The Court cites the cases of *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. Rep. 125, 54 L. Ed. 272, and *Herndon Co. v. Norris*, 224 U. S. 496, 32 Sup. Ct. Rep. 550, 56 L. Ed. 857.

See also *Sun Printing & Pub. Co.*, 121 Fed. 827, 58 C. C. A. 162.

<sup>3</sup> *Rust v. United States Waterworks case*, 70 Fed. 132, 17 C. C. A. 132.

<sup>4</sup> *Morgan v. Ward*, 224 Fed. 698, 703; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. Rep. 376, 48 L. Ed. 496.

<sup>5</sup> *Ex parte Jim Hong*, 211 Fed. 73, 78 (C. C. A.).

has jurisdiction over the parties and the subject-matter, and the court in the exercise of such jurisdiction commits error, such error must be brought for review in the U. S. Circuit Court of Appeals.<sup>1</sup>

Likewise, when the jurisdiction of the court as a Federal Court is not involved or raised *directly*, the appeal must be taken to the Circuit Court of Appeals.<sup>2</sup>

### § 5. Power to issue writs of prohibition and mandamus in aid of appellate jurisdiction.

Sect. 12 of the Act of March 3, 1891, provides:

“That the Circuit Court of Appeals shall have the powers specified in Section 716 of the Rev. St. of U. S.”

Under this section it was held that the U. S. Circuit Court of Appeals may issue writs of mandamus and prohibition, only in aid of its appellate jurisdiction.<sup>3</sup>

The Circuit Court of Appeals has power to issue a mandamus to compel the performance of its judgments and decrees.<sup>4</sup>

### § 6. When jurisdiction attaches.

The appellate jurisdiction of the Circuit Court of Appeals attaches as soon as the appeal or writ of error is allowed and is perfected.<sup>5</sup>

### § 7. BANKRUPTCY. Jurisdiction of the Circuit Court of Appeals—statutory provisions.

(a) Section 130 of Federal Judicial Code.

<sup>1</sup> Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. Rep. 490, 40 L. Ed. 731.

<sup>2</sup> World's Columbian Exposition v. United States, 56 Fed. 664, 6 C. C. A. 58.

<sup>3</sup> U. S. v. Mayer, 235 U. S. 55, 35 Sup. Ct. Rep. 16, 59 L. Ed. 129; U. S. v. Severens (C. C. A.), 71 Fed. 768.

<sup>4</sup> Howe Mach. Co. v. Dayton (C. C. A.), 210 Fed. 803. Consult index on “Mandamus.”

<sup>5</sup> United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. Rep. 16, 59 L. Ed. 129; Old Nick Williams Co. v. United States, 215 U. S. 541, 543, 54 L. Ed. 318, 320, 30 Sup. Ct. Rep. 221; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 335, 44 L. Ed. 1088, 1092, 20 Sup. Ct. Rep. 906; Re Chetwood, 165 U. S. 443, 456, 41 L. Ed. 782, 786, 17 Sup. Ct. Rep. 385; Brooks v. Norris, 11 How. 204, 207, 13 L. Ed. 665, 666; McClellan v. Garland, 217 U. S. 268, 30 Sup. Ct. Rep. 501, 54 L. Ed. 762; In re Rice, 155 U. S. 396, 15 Sup. Ct. Rep. 149, 39 L. Ed. 198; Ex parte Equitable Trust Co. (C. C. A. 9th Cir.) 231 Fed. 571.

(b) Sections 24 and 25, Bankruptcy Act provides:

"The Circuit Courts of Appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed."

**§ 8. Review and revise—by petition to revise.**

Section 246 of the Bankruptcy Act is as follows:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

**§ 9. By appeal in ten days.**

Section 25 of the Bankruptcy Act is as follows:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States . . . in the following cases, to wit:

"(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the Appellate Court in term or vacation, as the case may be."

**§ 10. Decision in the above causes final, but may be reviewed by certiorari.**

By the recent Act of Congress in effect January 6, 1916, judgments and decrees of the Circuit Court of Appeals in all proceedings and causes arising under the Bankruptcy Act are made final, save only that application for certiorari may be made to the Supreme Court as in other cases.

See "Certiorari," Chapter VIII.

**§ 11. Construction of Sections 23, 24, and 25 of the Bankruptcy Act.**

Sections 23, 24, and 25 of the Bankruptcy Act draw a clear line of demarcation between "proceedings in bankruptcy" and

“controversies at law and in equity arising in bankruptcy proceedings.” “Proceedings in bankruptcy” cover questions between the alleged bankrupt or the receiver or trustee of the bankrupt estate, on the one hand, and the general creditors, as such, on the other, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, as well as examinations, exemptions, allowance, and disallowance of claims, and the like, all of which naturally occur in the settlement of the estate. “Controversies at law and in equity arising in the course of bankruptcy proceedings” involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the receiver or trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors.<sup>1</sup>

If a creditor files and asks the allowance of a claim as an unsecured creditor, he plainly institutes a “proceeding in bankruptcy.” And if in connection with the presentation of such a claim, he asserts grounds by reason of which, in the distribution of the proceeds of the estate, he should be given priority over other general creditors,<sup>2</sup> the matter so presented nevertheless remains a “proceeding in bankruptcy.” And even if the trustee in his answer admits and allows the general claim and contests only the creditor’s right to priority, the nature of the proceeding is not affected. On the other hand, it is clear that if a claimant is in

<sup>1</sup> Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; United States Fidelity Co. v. Bray, 225 U. S. 205, 217, 32 Sup. Ct. 620, 56 L. Ed. 1055; In re Mueller, 135 Fed. 711, 68 C. C. A. 349; In re Friend, 134 Fed. 778, 67 C. C. A. 500; In re Breyer Printing Co., 216 Fed. 878.

<sup>2</sup> Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; In re Streator Metal Stamping Co., 205 Fed. 280, 123 C. C. A. 444; In re Breyer Printing Co., 216 Fed. 878, C. C. A. (7th Cir.).

possession of chattels under a bill of sale or mortgage, and if subsequent to his possession a petition in bankruptcy is filed and an adjudication in bankruptcy had against his grantor or mortgagor, and if thereafter the receiver or trustee of the bankrupt estate disputes the holder's right of possession, a controversy arises which is outside of the matter of the administration of the bankrupt estate. The property in question has not come into the custody of the bankruptcy court or of the receiver or trustee under and by virtue of the adjudication. If the holder maintains his possession and the trustee is compelled to bring a suit against him either in the bankruptcy court or some other court to cancel the alleged title or lien and to recover the property, the resulting order or decree could not be reviewed under 24b or 25a for the reason that the proceeding resulting in such order or decree was not a "proceeding in bankruptcy" within the administration of the estate. And the essential nature of the controversy respecting the holder's title or lien cannot, in our opinion, be affected by the question whether the suit to determine the validity of the alleged title or lien is begun by the petition or bill of the trustee or of the adverse claimant.

An order rejecting or allowing a claim by a landlord for rent against a trustee in bankruptcy is reviewable by appeal only.<sup>1</sup>

### § 12. Care should be taken in selecting mode of review.

A defeated party is not at liberty to disregard the appropriate appellate remedy provided for his case and choose some other that may better suit his inclination or convenience.<sup>2</sup> And this remains true, although the appellate court may allow a writ of error which is addressed to questions of law involved in a "proceeding in bankruptcy" to stand as a petition to review and

<sup>1</sup> In re Breyer Printing Co., 216 Fed. 878 (C. C. A. 7th Cir.).

<sup>2</sup> Matter of Loving, 224 U. S. 187, 32 Sup. Ct. 446, 56 L. Ed. 725; United States v. Beatty, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686; In re Friend, 134 Fed. 778, 780, 67 C. C. A. 500.

revise, since both are ranged on the same side of the demarcating line and the methods are substantially alike.<sup>1</sup>

But the U. S. Circuit Courts of Appeals in order to save the remedy have entertained both appeal and petitions to revise.<sup>2</sup>

**§ 13. Section 24b. Distinction between § 24b and controversies in bankruptcy.**

Section 24b of the Bankruptcy Act relates only to proceedings in bankruptcy, as distinguished from controversies arising in bankruptcy and from plenary suits.<sup>3</sup>

**§ 14. Time to bring petition to revise.**

In the Second Circuit, a petition to revise must be served and filed within ten days after order is entered.<sup>4</sup>

**§ 15. Remedies exclusive.**

The remedies by appeal and petition to revise are independent and exclusive of each other.<sup>5</sup>

**§ 16. Petition to revise must assign error of law.**

A petition to revise must assign some specific error of law.<sup>6</sup>

**§ 17. When petition to revise used.**

(a) Summary proceedings are reviewable only by a petition to revise.<sup>7</sup>

(b) Where it is sought, to present to the Circuit Court of

<sup>1</sup> Freed v. Central Trust Co., 215 Fed. 873, 132 C. C. A. 7th; In re Breyer, 216 Fed. 878 (C. C. A. 7th Cir.).

<sup>2</sup> Shea v. Lewis, 206 Fed. 877 (C. C. A.).

<sup>3</sup> Coder v. Arts, 213 U. S. 223, 233, 235, 29 Sup. Ct. Rep. 436, 53 L. Ed. 772; In re Loving, 224 U. S. 183, 32 Sup. Ct. Rep. 446, 56 L. Ed. 725; In re Mueller, 135 Fed. 711, 715; Barnes v. Pampel (C. C. A.), 192 Fed. 525, 527; Kraijer v. Snare & Triest Co., et al., 221 Fed. 255.

<sup>4</sup> Rule 38 of the C. C. A. 2d Circuit; In re Vanascope, 233 Fed. 53; In re Tanenhaus, 211 Fed. 971 (C. C. A. 2d Cir.).

<sup>5</sup> Bothwell v. Fitzgerald, 219 Fed. 408 (C. C. A.); In re Gold, 210 Fed. 410; In re Martin, 201 Fed. 31, 119 C. C. A. 363; Southern Cotton Mills v. Elliott, 218 Fed. 567 (C. C. A.); Rison v. Parkham, 219 Fed. 176.

<sup>6</sup> Huttig v. Sash Co., 218 Fed. 1 (C. C. A.); In re Witherbee, 202 Fed. 896, 121 C. C. A. 254; Pindel v. Holgate (C. C. A.), 221 Fed. 342.

<sup>7</sup> In re Goldstein, 216 Fed. 887 (C. C. A.); Gibbons v. Goldsmith, 222 Fed. 826.

Appeals the question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and it is reviewable by a petition to revise under Section 24b of the Bankruptcy Act.<sup>1</sup>

(c) It is conclusively established that where a court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant, its action may be reviewed by a petition for review.<sup>2</sup>

(d) Decisions of the District Court denying application of a creditor to set aside an order of adjudication in bankruptcy are reviewable only by a petition to revise.<sup>3</sup>

(e) Orders granting or refusing a discharge in bankruptcy are reviewable only by a petition to revise.<sup>4</sup>

(f) A petition to revise and not appeal is the proper remedy to review a decision of the District Court made on application of creditors for an order on the trustee to turn over certain property in his hands.<sup>5</sup>

(g) An order dismissing the petition of a trustee, the petition involving dividends, is reviewable by a petition to revise.<sup>6</sup>

<sup>1</sup> *Gibbons v. Goldsmith*, 222 Fed. 828; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. Rep. 269, 46 L. Ed. 405; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. Rep. 293, 46 L. Ed. 413; *Schweer v. Brown*, 195 U. S. 171, 25 Sup. Ct. Rep. 15, 49 L. Ed. 144; *First Nat. Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. Rep. 693, 49 L. Ed. 1051; *In re Gill*, 190 Fed. 726; *In re McMahon*, 147 Fed. 684-687; *In re Blum*, 202 Fed. 883; *Shea v. Lewis*, 206 Fed. 877; *In re Goldstein & Moseson*, 216 Fed. 887.

<sup>2</sup> *Shea v. Lewis*, 206 Fed. 877 (C. C. A. 8th Cir.); *In re Gill* and *In re Farmers & Mfg. Bank of Rich Hill*, 190 Fed. 726, Ill. C. C. A. 545; *Mueller v. Nugent*, 184 U. S. 1-15, 22 Sup. Ct. 269, 46 L. Ed. 144; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

<sup>3</sup> *Hart-Parr Co. v. Barkley* (C. C. A. 8th Cir.), 231, Fed. 913.

<sup>4</sup> *In re Vanoscope Co.* (C. C. A. 2d Cir.), 233 Fed. 53; *Brady v. Bernard & Kittmyer*, 170 Fed. 576, 95 C. C. A. 656; *Electric Co. v. Aetna Life Ins. Co.*, 206 Fed. 885, 124 C. C. A. 595.

<sup>5</sup> *In re Pierson* (C. C. A. 2d Cir.), 233 Fed. 519; *In re Rose of Shmfg. Co.*, 168 Fed. 39, 93 C. C. A. 461.

<sup>6</sup> *Nelson v. Hecksher*, 219 Fed. 682.

**§ 18. Decrees must have definiteness and finality.**

Only such decrees as have definiteness and finality can be reviewed on petition to revise.<sup>1</sup>

**§ 19. Evidence may be reviewed.**

On a petition to revise, the evidence will be examined to ascertain if the order of the District Court is wholly unsupported thereby, contrary to law, a clear mistake, or generally for any reason for which evidence may be reviewed on writ of error.<sup>2</sup>

The court may examine the evidence for the purpose of ascertaining whether there was any substantial evidence to sustain the order.<sup>3</sup>

**§ 20. Only questions of law reviewable by petition to revise.**

Disputed questions of fact cannot be tried out by a petition to revise.<sup>4</sup>

Only questions of law can be so tested out.<sup>5</sup>

**§ 21. How to review election of trustee.**

The proper way to review the proceedings in the matter of the election of a trustee is by a petition for review of the order of the referee approving the appointment of the trustee of the creditors.<sup>6</sup>

**§ 22. Appeals under § 25 Clause 3, Bankruptcy Act.**

Clause 3 of Section 25 of the Bankruptcy Act provides that appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals, from a judgment allowing or rejecting a debt or claim of \$500 or over.<sup>7</sup>

<sup>1</sup> In re Chottiner, 218 Fed. 813, 134 C. C. A. 501.

<sup>2</sup> Johnston v. Spencer, 195 Fed. 215, 115 C. C. A. 167; Shea v. Lewis, 206 Fed. 877 (C. C. A.); First National Bank v. Cole, 144 Fed. 392, 75 C. C. A. 330.

<sup>3</sup> Good v. Kane, 211 Fed. 956, 128 C. C. A. 454.

<sup>4</sup> In re Witherbee, 202 Fed. 896, 121 C. C. A. 254.

<sup>5</sup> Nelson v. Boyd, 213 Fed. 587, 130 C. C. A.

<sup>6</sup> In re Henry Siegel Co., 216 Fed. 943; 5 Am. Bankr. Rep. 155; In re Gill, 106 Fed. 57, 45 C. C. A. 218; 8 Am. Bankr. Rep. 85; In re Dayville Woolen Co., 114 Fed. 674; 12 Am. Bankr. Rep. 94; In re Gordon S. & M. Co., 129 Fed. 622.

<sup>7</sup> In re Mueller, 135 Fed. 711; Bothwell v. Fitzgerald, 219 Fed. 408; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. Rep. 446, 56 L. Ed. 725; Pindel v. Holgate, 221 Fed. 347.



Each method of procedure for the review of orders in bankruptcy is exclusive of the other.

**§ 23. When review is by appeal. Intervention.**

(a) Where an independent petition in the nature of an intervention is filed in the bankruptcy court and the claim is denied, an appeal is the proper mode of review and not a petition to revise.<sup>1</sup>

An intervention in a bankruptcy court for the purpose of asserting a title or claim to the property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under § 24a of the Bankruptcy Act.<sup>2</sup>

Wherever a third person intervenes in the bankruptcy court and asserts an independent and superior title to the property held by the trustee, claiming the right to recover and remove the same from the jurisdiction of the bankruptcy court as part of the estate to be administered, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition, or is brought into court upon the application of the trustee, and to review the judgment of that court his remedy is by an *appeal* under the provisions of Section 25b.<sup>3</sup>

(b) A decision of the District Court, sitting in bankruptcy,

<sup>1</sup> Southern Cotton Oil Co. v. Elliott, 218 Fed. 567 (C. C. A.); Barton Lumber & Brick Co. v. Prewitt (C. C. A.), 231 Fed. 919.

<sup>2</sup> Houghton v. Burdon, 228 U. S. 161, 172, 33 Sup. Ct. Rep. 491, 57 L. Ed. 780; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. Rep. 412, 54 L. Ed. 610; Hewitt v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. Rep. 690, 48 L. Ed. 986; Hurley v. Atchison T. & S. F. R. Co., 213 U. S. 126, 29 Sup. Ct. Rep. 466, 53 L. Ed. 729.

<sup>3</sup> Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. Rep. 436, 53 L. Ed. 772; Hewitt v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. Rep. 690, 48 L. Ed. 986; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. Rep. 412, 54 L. Ed. 610; Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. Rep. 491, 57 L. Ed. 780; Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212; In re Hartzell, 209 Fed. 775; In re McMahon, 147 Fed. 685; In re Rochford, 124 Fed. 182; Galbraith v. Robson-Hilliard Grocery Co., 216 Fed. 842; Gibbons v. Goldsmith, 222 Fed. 828.

granting or refusing a lien or priority against a bankrupt estate where the amount involved exceeds \$500 can be reviewed only by appeal and not by a petition to revise.<sup>1</sup>

(c) A decree setting aside a conveyance made by a bankrupt in fraud of creditors is reviewable only by appeal and not by writ of error.<sup>2</sup>

(d) An interlocutory decree of the U. S. District Court sitting in bankruptcy restraining proceedings in a state court and for the appointment of a receiver is reviewable by appeal under § 24a of the Bankruptcy Act, and not by petition to revise.<sup>3</sup>

(e) An order finding that an obligation has been paid is reviewable by appeal.<sup>4</sup>

(f) A controversy between landlord and tenant is reviewable by appeal.<sup>5</sup>

#### § 24. Plenary suits and summary proceedings.

There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act sum-

<sup>1</sup> *New Hampshire Savings Bank v. Varner*, 216 Fed. 721; *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, affirmed in 213 U. S. 223, 29 Sup. Ct. Rep. 436, 53 L. Ed. 772; *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. Rep. 446, 56 L. Ed. 725; *In re Hartzell*, 209 Fed. 775; *In re Streator Metal Stamping Co.*, 205 Fed. 280, 123 C. C. A. 444.

<sup>2</sup> *Carey v. Donohue*, 209 Fed. 328, C. C. A. 6th Cir.

<sup>3</sup> *Bothwell v. Fitzgerald*, 219 Fed. (C. C. A.) 408.

<sup>4</sup> *Rison v. Parham*, 219 Fed. 176; *In re Breyer Printing Co.*, 216 Fed. 878, C. C. A. 7th Cir.

<sup>5</sup> *Courtney v. Fidelity Trust Co.*, 219 Fed. 57.

marily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation.<sup>1</sup>

### § 25. Test of summary jurisdiction.

The jurisdiction of the bankruptcy court to determine in a summary proceeding adverse claims created before the filing of the petition in bankruptcy to liens upon and titles to property claimed by the trustee as that of the bankrupt is conditioned and limited by its actual possession thereof.

The test of the summary jurisdiction is that the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the *res* as the property of the bankrupt.

The declaration in *Mueller v. Nugent*, 184 U. S. 1-14, 22 Sup. Ct. 269, 275 (46 L. Ed. 405), that the filing of the petition . . . "is a caveat to all the world and in effect an attachment and injunction," has been so limited by subsequent decisions of the Supreme Court that it has no application to those holding substantial claims antedating the filing, to liens upon or titles to property claimed as that of the bankrupt. In the absence of proper proceedings to make such claimants parties to the bankruptcy proceeding, they are strange thereto, and their claims are unaffected thereby.<sup>2</sup>

### § 26. Court may take actual possession of property.

The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and title to property claimed by

<sup>1</sup> In *re Goldstein*, 216 Fed. 887; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In *re Blum*, 202 Fed. 883, 121 C. C. A. 241; *Shea v. Lewis*, 206 Fed. 877, 124 C. C. A. 537; In *re Yorkville Coal Co.* (C. C. A.) 211 Fed. 619; *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.

<sup>2</sup> In *re Rathman*, 183 Fed. 913, 106 C. C. A. 253, per Sanborn, *J.* *Mueller v. Nugent*, 184 U. S. 1-14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405.

the trustees as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt. When those in possession are not adverse claimants, but are only representatives of the bankrupt, without claim or lien upon, or right to, the property in themselves, the bankruptcy court may by summary proceeding take the actual possession of the property, and then, when it has thus acquired the actual possession, may by summary proceedings determine the validity of claims or liens upon and titles to it.<sup>1</sup>

**§ 27. When substantiality appears necessity for plenary suit.**

The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is not met by the trustee, or which, if met by a replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy. A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit.<sup>2</sup>

In such cases a plenary suit must be brought either at law or

<sup>1</sup> In re Rathman, supra, 183 Fed.ps. 922-923, 106 C. C. A. 253; Shea v. Lewis, 206 Fed. 880-881.

<sup>2</sup> In re Goldstein, 216 Fed. 887; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Blum, 202 Fed. 883, 121 C. C. A. 241; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; In re Yorkville Coal Co. (C. C. A.) 211 Fed. 619; Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, but see R. & W. Shirt Co., 222 Fed. 256 (C. C. A. 2nd Cir.).

in equity by the trustee, in which the adverse claim of title can be tried and adjudicated.<sup>1</sup>

**§ 28. When referee has no jurisdiction over questions of recovery of property. Adverse claims.**

It is well settled that where one seeks to recover property from an adverse claimant for the estate of the bankrupt such is not a proceeding in bankruptcy and the referee is without jurisdiction to hear and determine any questions arising thereon.<sup>2</sup>

**§ 29. Plea to jurisdiction must be denied by reply or replication.**

The averments in the plea to the jurisdiction of the court as set forth in the answer must be denied by a reply or replication, and if not so denied, an order overruling same is erroneous and must be reversed.<sup>3</sup>

**§ 30. Evidence on general inquiry competent only on question of jurisdiction.**

The transcript of the evidence taken upon the general inquiry to discover assets before the filing of the petition against the petitioners is only competent for the sole purpose of inquiring whether the District Court had jurisdiction to inquire into this matter in a summary manner. It is not competent for the purpose of deciding the merits of the case. This could not be done even by consent.<sup>4</sup>

<sup>1</sup> *Johnston v. Spencer*, 195 Fed. 215, 115 C. C. A. 167; *Shea v. Lewis*, 206 Fed. 877 (C. C. A.); *Bardes v. Howarden Bank*, 178 U. S. 524, 532, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Murphy v. John Hofman Co.*, 211 U. S. 562-570, 29 Sup. Ct. 154, 53 L. Ed. 327; *Babbitt v. Dutcher*, 216 U. S. 102-113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 An. Cas. 969; *Courtney v. Collins*, 176 Fed. 189, 99 C. C. A. 543.

<sup>2</sup> *Loveland, On Bankruptcy*, Vol. 2, § 540; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *In re Hayden (D. C.)*, 172 Fed. 623; *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *Augusta Grocery Co. v. Southern Moline Plow Co.*, 213 Fed. 786.

<sup>3</sup> *In re Gill*, 190 Fed. 726, 111 C. C. A. 454.

<sup>4</sup> *Ex parte Comingor-Sinsheiner, et al., v. Simminton*, 107 Fed. 898 (C. C. A. 6th Cir.); *Haffenberg v. Chicago Title and Trust Co.*, 192 Fed. 874.

**§ 31. Findings of referee not conclusive.**

The findings of a referee in bankruptcy are not conclusive, and will be set aside where the court is of the opinion they are manifestly erroneous.<sup>1</sup>

**§ 32. ADMIRALTY. Decision of Circuit Court of Appeals is final.**

An appeal in admiralty must be taken only to the U. S. Circuit Court of Appeals by service of a notice of appeal and filing bond in the sum of \$250.<sup>2</sup>

The Act of March 6, 1891, vests in the U. S. Circuit Court of Appeals appellate jurisdiction in admiralty cases, and the decisions of that court are final and non-appealable. The only mode of reviewing the final judgment of the U. S. Court of Appeals is by a petition for certiorari to the Supreme Court of the U. S. (See Certiorari.)

**§ 33. Prize causes. (See Chapter V. § 24.)**

Appeals in admiralty cases lie to the Circuit Court of Appeals and only in prize cases direct to the Supreme Court.<sup>3</sup>

**§ 34. Seizures on land under common law.**

As to seizures on land, the District Court proceeds as a court of common law and not as a court of admiralty.<sup>4</sup>

**§ 35. Time limit for appeal six months.**

Six months is the limit within which to take an appeal in an admiralty case. A rule of court fixing a shorter period is invalid.<sup>5</sup>

**§ 36. Appeal is a trial de novo.**

An appeal in admiralty brings up for review the whole testimony and is virtually a trial *de novo*. The Clerk of the District

<sup>1</sup> In re Miner, 9 Am. Bankr. Rep. p. 100, 117 Fed. 953; In re Elmore Cotton Mills (D. C.), 217 Fed. 819.

<sup>2</sup> Admiralty Rule I.

<sup>3</sup> See § 238 of Federal Judicial Code and see "*Admiralty*."

<sup>4</sup> 433 Cans of Frozen Egg Products v. U. S., 226 U. S. 179, 33 Sup. Ct. Rep. 50, 57 L. Ed. 174.

<sup>5</sup> Robins Dry Dock & Repair Co. v. Chesborough, 216 Fed. 122 (C. C. A. 1st Circuit); In re City of Naples, 69 Fed. 794, 16 C. C. A. 421 (8th Circuit); The New York, 104 Fed. 561, 44 C. C. A. 38 (2d Circuit).

Court is charged with the duty of preserving all charts marked and introduced in evidence.<sup>1</sup>

### § 37. Assignment of error on joint appeals.

Where both sides appeal in admiralty, either side may assign error.<sup>2</sup>

### § 38. The statute—Record.

Upon the appeal of any cause in equity or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal shall be transmitted to the Supreme Court: Provided, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.<sup>3</sup>

### § 39. How the record is made up in admiralty. The apostles.

Rule 4 of the Circuit Court of Appeals for the Second Circuit, ordains that the record in cases of admiralty and maritime jurisdiction shall be made up as follows:

“(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and the report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

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<sup>1</sup> The Catawissa, 213 Fed. 14 (C. C. A. 2d Cir.); The State of California, 49 Fed. 175, C. C. A.; Reed v. American Express Co., 241 U. S. 544, 36 Sup. Ct. Rep. 712, 60 L. Ed. 1156; Irvine v. The Hesper, 122 U. S. 256, 7 Sup. Ct. Rep. 1177, 30 L. Ed. 1175; Munson S. S. Line v. Miramar S. S. Co., Limited, 167 Fed. 960.

<sup>2</sup> The Maria Martin v. Northern Transportation Co. of Ohio, 12 Wall. 40, 20 L. Ed. 251.

<sup>3</sup> Part of R. S. § 698, U. S. Comp. Stat. 1901, p. 568.

"(2) All the pleadings with the exhibits annexed thereto.

"(3) All the testimony and other proof adduced in the cause.

"(4) The interlocutory decree and any order of the court which appellant, may desire to have reviewed on the appeal.

"(5) Any report of a commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

"(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

"(7) The final decree, and the notice of appeal; and

"(8) The assignments of error.

"Section 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

"Section 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostiles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal."\*

On March 13, 1917, the following rule amending Rule 16 was adopted by the Circuit Court of Appeals for the Second Circuit.

"1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or any district judge within the district or any judge of this court may enlarge the time upon four days' notice of the application served before its expiration on the attorney for the opposite party, the order of enlargement to be filed with the clerk of the District Court and to be transmitted by him to this court with the transcript of record. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

"2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by

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\* This rule seems to correspond with the rules generally prevailing in the different circuit courts of appeal.



this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

"3. Upon the filing of the transcript of a record brought up by a writ of error or appeal the appearance of the counsel for the party docketing the case shall be entered."

### § 40. One record when both sides appeal.

Where appeal is duly taken by both parties a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases.<sup>1</sup>

### § 41. Contents of record.

"The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case."<sup>2</sup>

### § 42. Objections to evidence—how availed of.

"In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."<sup>3</sup>

### § 43. Stipulating the record.

"When the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal."<sup>4</sup>

### § 44. Filing record—time limit.

"The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office."<sup>5</sup>

<sup>1</sup> R. S. § 1013, U. S. Comp. Stat. 1901, p. 716.   <sup>2</sup> Rule 8 U. S. Supreme Court.

<sup>3</sup> General Rule 12, 2nd Circuit.

<sup>4</sup> § 3 of Admiralty Rule 4, 2nd Circuit.

<sup>5</sup> Admiralty Rule 5, 2nd Circuit.

### § 45. Mandamus may be awarded.

"A mandamus may, in like manner (*i.e.*, in the circuit court of appeals on motion of an appellant), be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below."<sup>2</sup>

### § 46. Docketing.

"Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk."<sup>2</sup>

### § 47. New pleadings.

"If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk as in the 23d general rule provided."<sup>3</sup>

### § 48. New proof on appeal.

"Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party."<sup>4</sup>

"If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

"If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing."<sup>4</sup>

"Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission."<sup>5</sup>

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any district court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be

<sup>1</sup> Admiralty Rule 13, 2nd Circuit.

<sup>3</sup> Admiralty Rule 10 (C. C. A. 2nd Cir.)

<sup>2</sup> Admiralty Rule 15 (C. C. A. 2nd Cir.) <sup>4</sup> Admiralty Rule 7 (C. C. A. 2nd Cir.)

<sup>5</sup> Admiralty Rule 9 (C. C. A. 2nd Cir.)

taken under a commission to be issued from this court, or from any district court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible."<sup>1</sup>

### § 49. Hearing on appeal—notice limiting questions.

"The appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.<sup>2</sup> The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions."<sup>3</sup>

### § 50. TUCKER ACT, now Paragraph 20 of Section 24, Federal Judicial Code.

The District Court of the United States has jurisdiction over the subject-matter within the class of cases mentioned in Paragraph 20 of Section 24, Federal Judicial Code, concurrently with the Court of Claims, its judgments are but reviewable only in the United States Supreme Court.<sup>4</sup>

### § 51. JURISDICTION OF THE U. S. COURT OF APPEALS ON APPEAL FROM INTERLOCUTORY ORDERS AWARDING INJUNCTIONS AND RECEIVERSHIPS. Jurisdiction of the Court of Appeals.

"Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be

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<sup>1</sup> Rule 12, U. S. Supreme Court Rules.

<sup>2</sup> Rule 1 (C. C. A. 2nd Cir.)

<sup>3</sup> Rule 3 of Admiralty Rules (C. C. A. 2nd Cir.)

<sup>4</sup> U. S. v. Dtlcour 203 U. S. 408, 27 Sup. Ct. Rep. 58, 51 L. ed. 248; Twedee Trading Co. v. United States, decided by Circuit Court of Appeals, Second District, April 17, 1917, dismissing appeal for want of jurisdiction without opinion.

refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the courts below shall not be stayed unless otherwise ordered by that court, or a judge thereof, during the pendency of such an appeal: Provided, however, that the court below may, in its discretion, require as a condition of the appeal an additional bond."

Sec. 129, Federal Judicial Code.

### § 52. Equity Rule LXXIV. Continuing injunction pending appeal.

Rule LXXIV. promulgated by the Supreme Court of the United States, in effect February 1, 1913, provides:

"When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying, or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

### § 53. Supersedeas bond not sufficient to suspend or continue injunction.

A supersedeas bond given under the statute does not of itself suspend the operation of an injunction or continue it in force pending the appeal. To do so, a special order of Court is necessary under the rule.<sup>1</sup>

### § 54. Effect of appeal on pending cause.

Lower court retains control.<sup>2</sup>

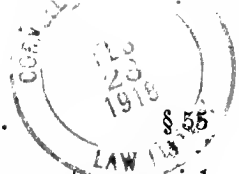
### § 55. Scope of appeal limited to injunction.

Appeals from orders or decrees not final are limited by statute to orders or decrees granting, continuing, refusing, dissolving, or refusing to dissolve interlocutory injunctions.<sup>3</sup>

<sup>1</sup> Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. Rep. 136, 27 L. Ed. 888.

<sup>2</sup> Foote v. Parsons Non-Skid Co., Ltd. 196 Fed. 951, 954.

<sup>3</sup> Sections 128 and 129 Judicial Code; Bothwell v. Fitzgerald, 219 Fed. 408, 414, 135 C. C. A. 212.



When other provisions, such as referring the cause to a special master to ascertain damages, etc., are included in the interlocutory decree granting an injunction, the appellate tribunal will confine its review to the propriety of the granting or dissolving of the injunction, and the case remains wholly in the control of the court below as to all other subjects.<sup>1</sup>

An order refusing a stay of proceedings, made in a case other than that in which the stay is operative, amounts to a denial of an injunction, under the section invoked, but an order refusing a stay, made in the case in which the desired stay would operate, would not amount to such denial of injunction.<sup>2</sup>

An order refusing to dissolve a temporary restraining order is not appealable under Section 129 of the Judicial Code as the order is made only pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion.<sup>3</sup>

A restraining order which is granted, or sustained, or denied after a hearing of the parties, and which, in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal.<sup>4</sup>

Where the court of original jurisdiction has not departed from the rules and principles of equity established for its guidance, but has exercised sound judicial discretion, its orders granting or dissolving an interlocutory injunction may not be reversed; and the question is not whether the appellate court would or would not make the order.<sup>5</sup>

<sup>1</sup> A. D. Howe Mach. Co. v. Dayton, 210 Fed. 80, 127 C. C. A. 351; Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. Rep. 404, 50 L. Ed. 707; Foote v. Parsons Non-Skid Co., [Ltd., 196 Fed. 951, 954; Kilmer Mfg. Co. v. Griswold, 67 Fed. 1017 (C. C. A.); Metallic Extraction Co. v. Brown, 104 Fed. 345, 43 C. C. A. 568.

<sup>2</sup> Griesen v. Mutual L. I. Co., C. C. A. 8th Cir., 165 Fed. 48, 50, 91 C. C. A. 86; Emery v. Central T. & S. D. Co., 204 Fed. 965, 968, 123 C. C. A. 287.

<sup>3</sup> Pack v. Carter, 223 Fed. 638, 640, 139 C. C. A. 184.

<sup>4</sup> Western U. T. Co. v. U. S. & M. T. Co., 221 Fed. 545, 553.

<sup>5</sup> American S. S. Co. v. Twin City S. Co., 202 Fed. 202, 206.

There must be an abuse of the privilege and failure to exercise judicial discretion by the court of original jurisdiction, which will justify a reversal.<sup>1</sup>

But when the facts show that the court in making the order has abused its discretion, the Appellate Court may review the order.<sup>2</sup>

### § 56. When injunction dissolved, scope broadened.

The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discretion of the trial court, and a review thereof by an appellate court is limited to the inquiry whether there was an abuse of discretion in granting the writ, is based largely upon the consideration that the object and purpose of the preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs according to the course and principles of equity. But no such consideration obtains where the trial court dissolves a preliminary injunction. The granting of an injunction to preserve the *status quo* may be a substantial and persuasive reason for continuing it in force. It follows that, when a preliminary injunction has been dissolved, the appellate court will not be limited to the question whether the trial court has abused its discretion in dissolving the injunction, but may inquire into all of the circumstances connected with the proceedings as they appear of record, and the effect the dissolution of the injunction may have on the rights of the parties.<sup>3</sup>

<sup>1</sup> Boyce v. Stewart-Warner S. Co., 220 Fed. 118, 121; Kansas City, Mo. v. Sanitary S. F. Mch. Co., 224 Fed. 964, 966; Stokes v. Williams, 226 Fed. 148, 156; Magruder v. Belle Ass'n, 219 Fed. 72, 82.

<sup>2</sup> Folk v. United States, 233 Fed. 177.

<sup>3</sup> Folk v. United States, 233 Fed. 177, C. C. A.; Bothwell v. Fitzgerald, 219 Fed. 414, 135 C. C. A. 212; In re Pindel, 221 Fed. 342; Kings County Raisin & Fruit Co. v. United States Con. Seeded Raisin Co., 182 Fed. 59; Blount v. Société Anonyme du Filtre Chamberland Système Pasteur, 53 Fed. 98.

**§ 57. Enjoining proceedings in State courts.**

(a) A court of the United States cannot enjoin proceedings in a State court, except in proceedings in bankruptcy, under § 720 of U. S. Revised Statutes.<sup>1</sup>

(b) This rule does not apply, however, when a suit commenced in a State court has been legally removed to the Federal court; the latter then may, when necessary to protect its own jurisdiction or render effective its decrees, enjoin further proceedings in the State court.<sup>2</sup>

(c) Nor is there any doubt of the authority of a court of the United States to grant an injunction to stay proceedings in a State court to protect its own jurisdiction.<sup>3</sup>

(d) The general principle is that it is not for the Federal courts to stop State officers from performing their statutory duty for fear that they should perform it wrongly.<sup>4</sup>

Especially is this true in the matter of collecting taxes and license fees.<sup>5</sup>

(e) Proceedings in the Federal courts to enjoin rates established by a State which are confiscatory are not embraced within Sect. 720 of the Revised Statutes of the U. S.<sup>6</sup>

<sup>1</sup> *In re Chetwood*, 165 U. S. 443, 17 Sup. Ct. Rep. 385, 41 L. Ed. 782; *Central National Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. Rep. 403, 42 L. Ed. 807; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. Rep. 1019, 38 L. Ed. 981; *Guaranty Trust Co. v. North Chi. St. R. R. Co., et al.*, 130 Fed. 801; *Oliver v. Orendorf Co.*, 105 Fed. 272; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Diggs and Keith v. Wolcott*, 8 U. S. (4 Cranch) 179, 2 L. Ed. 587; *McKim v. Voorhies*, 7 Cranch 279, 3 L. Ed. 342.

<sup>2</sup> *Pacific Live Stock Co. v. Lewis*, 217 Fed. 97; *Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Wagner v. Drake (D. C.)*, 31 Fed. 849; *Abeel v. Culberson (C. C.)*, 56 Fed. 329.

<sup>3</sup> *Central Trust Co. v. Western N. C. Co. (C. C.)*, 112 Fed. 471; *Pacific Live Stock Co. v. Lewis*, 217 Fed. 97.

<sup>4</sup> *First Natl. Bank v. Albright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349.

<sup>5</sup> *Boisé Artesian Hot & Cold Water Co. v. Boisé City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep. 426.

<sup>6</sup> *Atlantic Coast Line v. Prentiss*, 211 U. S. 210, 239, 29 Sup. Ct. Rep. 67, 53 L. Ed. 150, 164.

(f) But the United States Courts, by virtue of their general equity powers, have jurisdiction to enjoin the enforcement of a void judgment of a State court or one obtained by fraud or lack of jurisdiction.<sup>1</sup>

Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who, if concerned in executing such judgments, is considered in law as a mere trespasser.<sup>2</sup>

### § 58. FEDERAL TRADE COMMISSION. **Jurisdiction of the Court of Appeals.**

The act creates a Federal Trade Commission consisting of five members with a principal office in the City of Washington, but the commission may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.<sup>3</sup>

### § 59. Powers of the Commission.

Section 5 of the Act provides:

“That unfair methods of competition in commerce are hereby declared unlawful.

“The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce. . . .”<sup>4</sup>

<sup>1</sup> *Simon v. Southern Railway Company*, 236 U. S. 115, 132, 35 Sup. Ct. Rep. 255, 59 L. Ed. 492; *Hyde v. Stone*, 20 How. 175, 15 L. Ed. 875; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 391, 38 L. Ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Payne v. Hook*, 7 Wall. 429, 19 L. Ed. 261.

<sup>2</sup> *Harris v. Hardeman*, 14 How. 339, 14 L. Ed. 446 (default judgment entered on improper service); *Williamson v. Berry*, 8 How. 541, 12 L. Ed. 1189; *Scott v. McNeal*, 154 U. S. 46, 38 L. Ed. 901, 14 Sup. Ct. Rep. 1108; *Western Life Indemnity Co. v. Rupp*, 235 U. S. 273, 35 Sup. Ct. Rep. 51, 59 L. Ed. 210; *Simon v. Southern Ry. Co.*, 236 U. S. 115, 132, 35 Sup. Ct. Rep. 255, 59 L. Ed. 492.

<sup>3</sup> Act of Sept. 26, 1914, Ch. 311; 38 Stat. L. 717, 718.

<sup>4</sup> 38 Stat. L. 719.



**§ 60. Procedure before Commission and U. S. Court of Appeals.**  
The act further provides:

“Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

“If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon, shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. . . .”<sup>2</sup>

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<sup>2</sup> Act of Sept. 26, 1914, Ch. 311, § 5; 38 Stat. L. 719.

### § 61. Further proof.

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts. . . ." <sup>1</sup>

### § 62. Service of process.

"Complaints, orders, and other processes of the commission under this section may be served by any one duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person,

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<sup>1</sup> Act of Sept. 26, 1914, Ch. 311, § 5; 38 Stat. L. 719.

partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

CHAPTER VII

**Jurisdiction of the Supreme Court of the United States on Appeal or Error from the U. S. Circuit Court of Appeals**

- | Sec.  | Sec.   |
|---|--|
| 1. From Circuit Court of Appeals, § 241 Federal Judicial Code.  | 19. Specific propositions of law only will be considered and answered.   |
| 2. Rules of Practice.<br>(a) Rule 40 of U. S. Supreme Court.<br>(b) Mode of reëxamination.              | 20. Categorical answers.   |
| 3. Judgment must be final.  | 21. Questions in bankruptcy may be certified.                            |
| 4. When appealable to Supreme Court.  | 22. No certification after decision in Circuit Court of Appeals.         |
| 5. Amended bill may extend ground of jurisdiction.  | 23. Clerk's fee must be paid before record furnished.                    |
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| 14. No jurisdiction to interpret mandate of Circuit Court of Appeals.                                   | 32. Mandamus when inferior court acts without authority.                 |
| 15. Upon reversal in Court of Appeals, case cannot after second trial be taken direct to Supreme Court. | 33. Ministerial duty exclusively.  |
| 16. Certified questions. §§ 239 and 251 of Federal Judicial Code.                                       | 34. Mandamus to compel reversal will not lie.                            |
| 17. The rule of court. Rule 37, Supreme Court.  | 35. Judgment on mandamus reviewed by writ of error.                      |
| 18. Only specific questions to be certified.  | 36. Mandamus jurisdiction of U. S. District Court.                       |

**§ 1. From Circuit Court of Appeals, § 241 Federal Judicial Code.**  
Sec. 241 of the Federal Judicial Code is as follows:

"In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the Title, *there shall be of right an appeal or writ of error* to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides cost."

**§ 2. Rules for practice.**

Rule 40 of the U. S. Supreme Court is as follows:

"(a) Practice in cases from Circuit Court of Appeals.

"The provisions of these rules relating to the practice on direct writs of error to and appeals from the district courts shall also be deemed to relate to and cover the practice on writs of error to and appeals from the Circuit Court of Appeals."

"(b) Reexaminations of final judgments or decrees of the Court of Appeals are to be on writ of error or appeal in the same manner and under the same regulations as in cases of writs of error and appeals from judgments in the Supreme Court of the District of Columbia."<sup>1</sup>

**§ 3. Judgment must be final.**

The judgment of the Circuit Court of Appeals must be final in its nature to entitle a party to bring it for review in the Supreme Court of U. S. under this section of the statute.<sup>2</sup> Where the jurisdiction of the Federal Court originally invoked was solely on the ground of diversity of citizenship, the mere fact that constitutional questions afterwards arose in the course of the proceedings does not justify an appeal from the Circuit Court of Appeals to the Supreme Court of the U. S., if the unsuccessful party elected to appeal from the District Court to the U. S. Court of Appeals.<sup>3</sup>

A decree of the Circuit Court of Appeals affirming a decree of the District Court, is final, unless, in addition to the allegations

<sup>1</sup> 27 Stat. at L. 434, Chap. 74, § 8; *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. Rep. 233, 45 L. Ed. 339.

<sup>2</sup> *Kerwan v. Murphy*, 170 U. S. 205, 18 Sup. Ct. Rep. 592, 42 L. Ed. 1009; *German Natl. Bank v. Specker*, 181 U. S. 405, 21 Sup. Ct. Rep. 688, 45 L. Ed. 926.

<sup>3</sup> *Boisé Artesian H. & C. Water Co. v. Boisé City*, 230 U. S. 98, 33 Sup. Ct. Rep. 1003, 57 L. Ed. 1409.

of diverse citizenship which are contained in the bill, there was an averment of a cause of action and substantial basis of jurisdiction arising under the Constitution or statutes of the United States.<sup>1</sup>

An order directing an officer of a corporation to answer certain questions propounded by the Interstate Commerce Commission is final and appealable.<sup>2</sup>

#### § 4. When appealable to Supreme Court.

When the jurisdiction of the District Court depends wholly upon diversity of citizenship, the judgment of the Circuit Court of Appeals is final and is not appealable to the Supreme Court of the United States.<sup>3</sup> But where the cause of action of the plaintiff was predicated both upon diversity of citizenship and upon the constitution or a statute of the United States, and where therefore the jurisdiction of the District Court did not depend entirely upon diversity of citizenship, the judgment of the Circuit Court of Appeals is appealable and may be reviewed in the Supreme Court of the United States by appeal or error according to the nature of the case, provided the amount in controversy exceeds the sum of one thousand dollars.<sup>4</sup>

<sup>1</sup> MacFadden v. United States, 213 U. S. 288, 53 L. Ed. 801, 29 Sup. Ct. Rep. 490; Shulthis v. McDougal, 226 U. S. 561, 56 L. Ed. 1205, 32 Sup. Ct. Rep. 704.

<sup>2</sup> Ellis v. Interstate Commerce Commission, 237 U. S. 434, 35 Sup. Ct. Rep. 64, 59 L. Ed. 1036.

<sup>3</sup> Delaware L. & W. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. Rep. 902, 59 L. Ed. 1397; Arbuckle v. Blackburn, 191 U. S. 408, 24 Sup. Ct. Rep. 148, 48 L. Ed. 246.

<sup>4</sup> See also Section 241 of the Judicial Code. G. & C. Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618, 35 Sup. Ct. Rep. 708, 59 L. Ed. 1148; Wilson Cypress Co. v. Del. Pozo Y Marcos, 236 U. S. 635, 657, 35 Sup. Ct. Rep. 446, 59 L. Ed. 758; Vicksburg v. Henson, 231 U. S. 259, 58 L. Ed. 209, 34 Sup. Ct. Rep. 95; Macfadden v. United States, 213 U. S. 288, 29 Sup. Ct. Rep. 490, 53 L. Ed. 801; Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. Rep. 491, 57 L. Ed. 180; Colorado, etc., M. Co. v. Turck, 150 U. S. 142, 37 L. Ed. 1030, 14 Sup. Ct. Rep. 35; Union P. Ry. v. Harris, 158 U. S. 327, 39 L. Ed. 1003, 15 Sup. Ct. Rep. 843; Florida, etc., Ry. v. Bell, 176 U. S. 321, 44 L. Ed. 486, 30 Sup. Ct. Rep. 399; Hugueley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 294, 22 Sup. Ct. Rep. 452, 46 L. Ed. 546; Borgmeyer v. Idler, 159 U. S. 413, 40 L. Ed. 199, 16 Sup. Ct. Rep. 34.

**§ 5. Amended bill may extend ground of jurisdiction.**

In the recent case of *Vicksburg v. Henson*, 231 U. S. 259, 58 L. Ed. 209, the Supreme Court of the United States clarified the mooted question of the jurisdiction of the United States Supreme Court on appeal from the U. S. Circuit Court of Appeals, using the following language:

"The further contention is made that the jurisdiction of the Circuit Court of Appeals was final because the jurisdiction of the District Court as originally invoked depended solely upon diverse citizenship. But it appears that when the amended and supplemental bill was filed there were added to the ground of original jurisdiction allegations concerning the proper construction of the contract rights of the receiver, which attacked the proposed action of the city on the ground that it would be destructive of constitutional rights. We think those allegations brought into the case a ground of jurisdiction independent of diversity of citizenship. They were grounds which existed before the suit was begun, which might have been averred in the original bill, and which were brought into the case by the amendment. We think, therefore, that the jurisdiction of the District Court did not rest solely upon diversity of citizenship, but upon the additional ground of deprivation of Federal right. In this view the decision of the Circuit Court of Appeals is not final, and an appeal may be taken to this Court."<sup>1</sup>

**§ 6. Corporations organized under Act of Congress.**

The decisions of the U. S. Circuit Court of Appeals against a corporation organized under an act of Congress is reviewable in the U. S. Supreme Court.<sup>2</sup>

**§ 7. No review in admiralty, contempt, or criminal causes.**

Decree of U. S. Circuit Court of Appeals in admiralty is final.<sup>3</sup>

A judgment affirming a sentence in a contempt proceeding is final within the above section and can only be reviewed in the U. S. Supreme Court by certiorari.<sup>4</sup>

This is also true of all judgments in criminal cases.<sup>5</sup>

<sup>1</sup> The Court cites *Macfadden v. United States*, 213 U. S. 288, 53 L. Ed. 801, 29 Sup. Ct. Rep. 490.

<sup>2</sup> *Texas & P. R. Co. v. Hill*, 237 U. S. 215, 35 Sup. Ct. Rep. 575, 59 L. Ed. 918.

<sup>3</sup> *Oregon R. R. v. Balfour*, 179 U. S. 56, 21 Sup. Ct. Rep. 28, 45 L. Ed. 82.

<sup>4</sup> *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 23 Sup. Ct. Rep. 211, 47 L. Ed. 244; *O'Neil v. U. S.*, 190 U. S. 36, 23 Sup. Ct. Rep. 776, 47 L. Ed. 945.

<sup>5</sup> *Hunt v. U. S.*, 166 U. S. 424, 17 Sup. Ct. Rep. 609, 41 L. Ed. 1063.

### § 8. When a party cannot have two appeals.

Of course, a party having elected to go to the U. S. Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the District Court to the U. S. Supreme Court.<sup>1</sup>

### § 9. Scheme of appellate jurisdiction.

The intention of the act in general is that the appellate jurisdiction should be distributed, and that there should not be two appeals, but, in cases where the decisions of the Courts of Appeals are not made final, it is provided that there shall be of right an appeal or writ of error or review of the case by the U. S. Supreme Court where the matter in controversy shall exceed one thousand dollars.<sup>2</sup>

### § 10. Two appeals to save remedy—How disposed of.

But where a party in order to save his remedy appealed direct to the U. S. Supreme Court on the question of jurisdiction and also took another appeal to the U. S. Circuit Court of Appeals, it was held that the latter court has no power to compel him to elect the court in which he will prosecute his appeal to a final determination, and that upon the dismissal of the first appeal by the U. S. Supreme Court for want of jurisdiction, it became the duty of the U. S. Circuit Court of Appeals to hear and determine the appeal pending in that court.<sup>3</sup>

### § 11. Jurisdictional amount.

An appeal cannot be taken from the Circuit Court of Appeals to the U. S. Supreme Court with reference to the discharge of a bankrupt by a creditor, as the matter in controversy must have

<sup>1</sup> Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 418, 24 Sup. Ct. Rep. 376, 48 L. Ed. 496, 499; Ayers v. Polsdorfer, 187 U. S. 535, 23 Sup. Ct. Rep. 196, 47 L. Ed. 314; Loeb v. Columbia Twp. Co., 179 U. S. 472, 21 Sup. Ct. Rep. 174, 45 L. Ed. 280; Robinson v. Caldwell, 165 U. S. 359, 17 Sup. Ct. Rep. 343, 41 L. Ed. 745.

<sup>2</sup> American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 283, 21 Sup. Ct. Rep. 646, 45 L. Ed. 859.

<sup>3</sup> David Lamar v. United States, 241 U. S. 105, 36 Sup. Ct. Rep. 535, 60 L. Ed. 912.



actual value according to the last clause of § 6 of the Judiciary Act of March 3, 1891, which is to the effect that the matter in controversy shall exceed the one thousand dollars, besides costs, and the actual value required cannot be supplied by speculation on the possibility that, if a discharge were refused, something might be made out of the bankrupt.<sup>1</sup>

Where the jurisdictional amount of one thousand dollars does not exist, the appeal will be dismissed.<sup>2</sup>

### § 12. Where no jurisdictional amount is required.

"A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute:

"(Patent and copyright cases.) First. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the supreme court of the District of Columbia, or of any Territory, in any case touching patents-rights or copyrights.

"(Actions for enforcement of any revenue law.) Second. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by the United States for the enforcement of any revenue laws thereof.

"(Actions against revenue officers.) Third. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action against any officer of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the Treasury.

"(Cases on account of deprivation of rights of citizens or under the Constitution.) Fourth. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States.

"(Suits for injuries by conspirators against civil rights.) Fifth. Any final judgment of a circuit court, or of any district court acting as a circuit court, in any civil action brought by any person on account of injury to his person or property by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty." (U. S. Rev. Statutes Sec. 699.)

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<sup>1</sup> *Huntington v. Saunders*, 163 U. S. 319, 16 Sup. Ct. Rep. 1120, 41 L. Ed. 174; *Durham v. Seymour*, 161 U. S. 235, 16 Sup. Ct. Rep. 452, 40 L. Ed. 682.

<sup>2</sup> *Hugueley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 294, 22 Sup. Ct. Rep. 452, 46 L. Ed. 547.

This section is applicable to the U. S. District Court and Circuit Court of Appeals.

**§ 13. How to show jurisdictional amount.**

It is better that the jurisdictional amount shall appear of record, but the fact may be shown by affidavit.<sup>1</sup>

**14. No jurisdiction to interpret mandate of Circuit Court of Appeals.**

The United States Supreme Court has no jurisdiction to interpret a mandate issued by the United States Circuit Court of Appeals, and an appeal based upon an erroneous interpretation by the U. S. District Court of a mandate of the Court of Appeals must be taken to that court and not to the Supreme Court.<sup>2</sup>

**§ 15. Upon reversal in Court of Appeals, case cannot after second trial be taken direct to Supreme Court.**

When a case has once been in the U. S. Circuit Court of Appeals and was there reversed for further proceedings, a judgment entered by the District Court subsequent to the remandment cannot be reviewed directly in the Supreme Court of the United States, but must be taken again to the Court of Appeals, even though the questions raised upon the second trial involve constitutional or other Federal questions which would have permitted the taking of the case in the first instance to the Supreme Court of the United States.<sup>3</sup>

**§ 16. Certified questions. §§ 239 and 251 of Federal Judicial Code.**

Sec. 239 of the Judicial Code provides:

<sup>1</sup> United States v. Trans-Missouri iFreight Ass'n, 166 U. S. 310, 17 Sup. Ct. Rep. 540, 41 L. Ed. 1017; Robinson v. Suburban Brick Co., 62 C. C. A. 484, 127 Fed. 806.

<sup>2</sup> Union Trust Co. v. Westhus, 228 U. S. 519, 33 Sup. Ct. Rep. 593, 57 L. Ed. 947; U. S. v. Shapiro, 235 U. S. 412, 417, 35 Sup. Ct. Rep. 122, 59 L. Ed. 291.

<sup>3</sup> Shapiro v. United States, 235 U. S. 412, 59 L. Ed. 291, 35 Sup. Ct. Rep. 122; Union Trust Co. v. Westhus, 228 U. S. 519, 33 Sup. Ct. Rep. 593, 57 L. Ed. 947; Brown v. Alton Water Co., 222 U. S. 325, 32 Sup. Ct. Rep. 156, 56 L. Ed. 221; Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. Rep. 713, 44 L. Ed. 861.

"In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the question and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

Part of Sec. 251 of the same Code further provides:

"It shall also be competent for said Court of Appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instructions on the questions and propositions certified to it, which shall be binding upon said Court of Appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner, as if it had been brought there for review by writ of error or appeal."

### § 17. The rule.

Rule 37 of the Supreme Court of the United States is as follows:

"1. Where, under Section 239 of the act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, Chapter 231, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

"2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record."

### § 18. Only specific questions to be certified.

The whole case, even when its decision turns upon matters of law only, cannot be certified by the Circuit Court of Appeals to the Supreme Court of the United States.<sup>1</sup>

<sup>1</sup> Chicago, Burlington & Quincy R. R. Co. v. Williams, 205 U. S. 449, 51 L. Ed. 877, 27 Sup. Ct. Rep. 559; U. S. v. Mayer, Judge, 235 U. S. 55, 72, 35 Sup. Ct. Rep. 16, 59 L. Ed. 129.

Only questions of gravity and importance should be certified to the Supreme Court of the United States for instruction.<sup>1</sup>

**§ 19. Specific propositions of law only will be considered and answered.**

On a certificate the Supreme Court of the United States will not go into the questions of fact or mixed questions of law and fact—only the several propositions of law as certified by the U. S. Circuit Court of Appeals will be answered.<sup>2</sup>

Each distinct point or proposition of law must be clearly stated and certified so that it can be distinctly answered without regard to the other issues in the case.<sup>3</sup>

The Supreme Court of the United States is confined to facts stated in the certificate and cannot consider other facts set forth in the briefs.<sup>4</sup>

**§ 20. Categorical answers.**

When a case is certified, the Supreme Court of the U. S. will make a categorical answer to each question submitted to it.<sup>5</sup>

**§ 21. Questions in bankruptcy may be certified.**

Questions of law in bankruptcy matters may be certified by the United States Court of Appeals to the Supreme Court of the United States.<sup>6</sup>

<sup>1</sup> Ex Parte Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. Rep. 43, 25 L. Ed. 869.

<sup>2</sup> Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. Rep. 136, 58 L. Ed. 285.

<sup>3</sup> McHenry v. Alforth, 168 U. S. 651, 18 Sup. Ct. Rep. 242, 42 L. Ed. 614; Columbus Watch Co. v. Robins, 148 U. S. 266, 13 Sup. Ct. Rep. 594, 37 L. Ed. 445; U. S. v. Mayer, Judge, 235 U. S. 55, 72, 59 L. Ed. 129, 35 Sup. Ct. Rep. 16.

<sup>4</sup> Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. Rep. 642, 45 L. Ed. 845.

<sup>5</sup> In re Elkus, 216 U. S. 115, 30 Sup. Ct. Rep. 377, 54 L. Ed. 407.

<sup>6</sup> White v. Schlock, 178 U. S. 542, 20 Sup. Ct. Rep. 1007, 44 L. Ed. 1183; Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. Rep. 642, 45 L. Ed. 845; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. Rep. 67, 47 L. Ed. 122; In re Wood, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; In re Elkus, 216 U. S. 115, 30 Sup. Ct. Rep. 377, 54 L. Ed. 407; Matter of Harris, 221 U. S. 274, 31 Sup. Ct. Rep. 557, 55 L. Ed. 732.

**§ 22. No certification after decision in Circuit Court of Appeals.**

A case cannot be certified to the United States Supreme Court after decision by the Court of Appeals.<sup>1</sup>

**§ 23. Clerk's fee must be paid before record furnished.**

Clause 6 of Rule 31 of the U. S. Circuit Court of Appeals for the Second Circuit provides for the payment of all fees to the clerk of the Court of Appeals before a transcript of the record will be transmitted to the clerk of the Supreme Court of the United States.

**§ 24. Record must be furnished on application.**

"Where application is made to this court to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant as part of the application." (§ 3 of Rule 37 of U. S. Supreme Court.)

**§ 25. Form of certificate.<sup>2</sup>**

**§ 26. Jurisdiction of the U. S. Supreme Court in bankruptcy.**

Sec. 252 of the Federal Judicial Code provides:

"The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."

**§ 27. Under the new law no appeal in bankruptcy lies to the Supreme Court.**

Section 252 of the Federal Judicial Code, permitting an appeal from the U. S. Court of Appeals to the Supreme Court, was impliedly repealed by the Act of Congress of September 6, 1916, and the remedy is now limited to a petition for certiorari.<sup>3</sup>

<sup>1</sup> Wall v. Cox, 181 U. S. 245, 21 Sup. Ct. Rep. 642, 45 L. Ed. 845.

<sup>2</sup> For form of approved certificate see: *Hallowell v. U. S.*, 221 U. S. 317, 31 Sup. Ct. Rep. 587, 55 L. Ed. 750; *Hills v. Hoover*, 220 U. S. 329, 31 Sup. Ct. Rep. 402, 55 L. Ed. 485; *Delaware v. Albany*, 213 U. S. 435, 29 Sup. Ct. Rep. 540, 53 L. Ed. 862.

<sup>3</sup> *Staats Co. v. Security Trust and Savings Bank*, decided March 7, 1917, opinion by Mr. Justice Day, not reported at the time this book went to press.

**§ 28. Prohibition and mandamus. Prohibition limited to admiralty.**

Sec. 688 Federal Statutes is as follows:

“The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party.”

This section limits the jurisdiction of the Supreme Court to issue writs of prohibition to admiralty and maritime cases only.<sup>1</sup>

**§ 29. Mandamus used in aid of appellate jurisdiction.**

As a rule, mandamus will not be issued except in aid of appellate jurisdiction.<sup>2</sup>

**§ 30. Mandamus allowed in absence of appellate remedy.**

But where there is no provision for an appeal, mandamus will be allowed.<sup>3</sup>

**§ 31. General use of mandamus.**

The writ of mandamus cannot be issued to compel a judicial tribunal to decide a matter within its discretion in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor be used to perform the office of an appeal or writ of error. And it only lies, as a general rule, where there is no other adequate remedy. As respects the Federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of the Supreme Court and

<sup>1</sup> *Ex parte Easton*, 95 U. S. 72, 24 L. Ed. 373; *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. Rep. 453, 36 L. Ed. 232, but see *U. S. v. Mayer*, 235 U. S. 55, 35 Sup. Ct. Rep. 16, 59 L. Ed. 129, where a writ of prohibition was issued in a criminal case.

<sup>2</sup> *In re Massachusetts*, 197 U. S. 482, 25 Sup. Ct. Rep. 512, 49 L. Ed. 845; *In re Glaser*, 198 U. S. 171, 25 Sup. Ct. Rep. 653, 49 L. Ed. 1000.

<sup>3</sup> *Ex parte Metropolitan Waterworks Co.*, 220 U. S. 539, 31 Sup. Ct. Rep. 600, 55 L. Ed. 575; *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. Rep. 324, 55 L. Ed. 252.

does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of the Supreme Court.<sup>1</sup>

### § 32. Mandamus when inferior court acts without authority.

The writ was granted in cases where the inferior Federal courts have assumed jurisdiction of removal causes, and acted beyond their power and authority in so doing.<sup>2</sup> Mandamus was also awarded in a case where the district court without jurisdiction vacated a judgment after term.<sup>3</sup>

### § 33. Ministerial duty exclusively.

It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary.<sup>4</sup> The duty to be enforced by mandamus must not only be ministerial, but it must be a duty which exists at the time when the application for the mandamus is made.<sup>5</sup> The obligation must be both peremptory and plainly defined. The law must not only authorize the act, but it must require the act to be done.<sup>6</sup> Mandamus may be resorted to to compel a judge to decide or enter judgment in a case, but not in a particular way.<sup>7</sup>

<sup>1</sup> *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. Rep. 324, 55 L. Ed. 252; *McClellan v. Garland*, 217 U. S. 268, 30 Sup. Ct. Rep. 501, 54 L. Ed. 762; *In re Blake*, 175 U. S. 117, 20 Sup. Ct. Rep. 42, 44 L. Ed. 94; *City Bank of Ft. Worth v. Hunter*, 152 U. S. 512, 14 Sup. Ct. Rep. 675, 38 L. Ed. 534; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. Rep. 291, 40 L. Ed. 414; *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994.

<sup>2</sup> *In re Winn*, 213 U. S. 458, 459, 29 Sup. Rep. 515, 53 L. Ed. 873; *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. Rep. 536, 37 L. Ed. 386.

<sup>3</sup> *In re Metropolitan Trust Co.*, 218 U. S. 321, 31 Sup. Ct. Rep. 18, 54 L. Ed. 1051.

<sup>4</sup> *U. S. v. Lamont*, 155 U. S. 303, 310, 15 Sup. Ct. Rep. 97, 39 L. Ed. 160; *Noble v. Union River Logging Co.*, 147 U. S. 165, 13 Sup. Ct. Rep. 271, 37 L. Ed. 123; *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. Rep. 12, 32 L. Ed. 354; *Butterworth v. U. S.*, 112 U. S. 50, 5 Sup. Ct. Rep. 25, 28 L. Ed. 656.

<sup>5</sup> *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *U. S. v. Lamont*, 155 U. S. 303, 15 Sup. Ct. Rep. 97, 39 L. Ed. 160.

<sup>6</sup> *U. S. v. Lamont*, 155 U. S. 303, 310, 15 Sup. Ct. Rep. 97, 39 L. Ed. 160.

<sup>7</sup> *Re Parsons*, 150 U. S. 150, 14 Sup. Ct. Rep. 50, 37 L. Ed. 1034; *Re Hohorst*,

**§ 34. Mandamus to compel reversal will not lie.**

Mandamus will not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction; especially where in regular course the decision may be reviewed upon a writ of error or an appeal. And this is true of a decision denying a motion to remand.<sup>1</sup>

**§ 35. Judgment on mandamus reviewed by writ of error.**

A judgment of the Federal District Court refusing or awarding a writ of mandamus may be reviewed only by writ of error and not by appeal.<sup>2</sup>

**§ 36. Mandamus jurisdiction of U. S. District Court.**

In absence of statutory authority, district courts of U. S. cannot issue a writ of mandamus, as an original and independent remedy and are limited to its use as a process in the enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes.<sup>3</sup>

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150 U. S. 653, 14 Sup. Ct. Rep. 221, 37 L. Ed. 1211; *In re Watts*, 214 Fed. 50 (C. C. A. 2d Cir.).

<sup>1</sup> *Ex parte Roe*, 234 U. S. 70, 34 Sup. Ct. Rep. 722, 58 L. Ed. 1217.

<sup>2</sup> *U. S. v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 35 Sup. Ct. Rep. 363, 59 L. Ed. 598.

<sup>3</sup> *Heine v. Sever Com.* 19 Wall. 655, 22 L. Ed. 223; *Smith v. Bourbon County*, 127 U. S. 106, 8 Sup. Ct. Rep. 1043, 32 L. Ed. 73; *U. S. v. Louisville R. Co.*, 212 Fed. 492; *U. S. v. N. C. St. L. R.* 217 Fed. 254, 259.



CHAPTER VIII

**Certiorari from U. S. Supreme Court to U. S. Circuit Court of Appeals.**

- | Sec.  | Sec.  |
|---|---|
| 1. Jurisdiction of the Supreme Court of U. S.   | 18. Administrative orders not reviewable.                       |
| 2. New Legislation—Act of September 6, 1916.  | 19. Certiorari will not lie where an appeal may be taken.       |
| 3. Stay by Court of Appeals.  | (a) In general.   |
| 4. Circuit Court of Appeals has no power to allow certiorari to Supreme Court.  | (b) Trademark cases.  |
| 5. Instructions relative to application for writs of certiorari under Act of March 3, 1891, issued by the clerk of the Supreme Court. | (c) Contempt proceedings.                                       |
| 6. Contents of petition—Notice.   | (d) Cases in Admiralty.   |
| 7. Time limit for application.  | (e) Habeas Corpus. <sup>1</sup>                                 |
| 8. Petition may be filed in vacation.   | (f) Criminal cases.   |
| 9. Review confined to errors specified in petition.   | 20. Where both certiorari and writ of error may be resorted to. |
| 10. Errors not raised in trial court and not in record.   | 21. When the writ of certiorari will lie:                       |
| 11. At what stage certiorari may issue:   | (a) No definite rule.   |
| (a) At any time.  | (b) Not issued as of right—Only in important cases.             |
| (b) As a rule jurisdiction declined before final judgment.  | (c) To correct excesses of jurisdiction.                        |
| 12. Scope of review.  | (d) Vests final control in Supreme Court.                       |
| (a) Every question raised by assignment considered.   | (e) To avoid conflict of courts.                                |
| (b) Disposition on merits.  | (f) National questions.   |
| 13. Questions not raised in trial court but passed upon by Court of Appeals may be reviewed.  | (g) Matters of navigation.                                      |
| 14. Effect of refusal of Court of Appeals to take jurisdiction.   | (h) Court of Appeals divided.                                   |
| 15. Certiorari in interlocutory appeals.  | (i) For the sake of uniformity of law.                          |
| 16. More than one writ allowed—when.  | (j) Conflict of decision affecting same patent.                 |
| 17. No jurisdictional amount.   | (k) Disqualification of judge.                                  |
|   | (l) Jurisdiction of Court of Appeals in issue.                  |
|   | (m) In criminal cases.  |
|   | 22. Effect of allowance of the writ.                            |
|   | 23. Mandate on certiorari.                                      |
|   | 24. Refusal of writ—effect of.                                  |

**§ 1. Jurisdiction of the Supreme Court of United States.**

Sec. 240 of the Judicial Code provides:

"In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

**§ 2. New Legislation—Act of September 6, 1916.**

On September 6, 1916, Congress passed the following additional act making final certain other judgments of the Circuit Court of Appeals. Said Act is as follows:

"§ 1120a (Act Jan. 28, 1915, C. 22, § 4, as amended, Act Sept. 6, 1916, C. 448 § 3). Judgments and decrees of the Circuit Courts of Appeals in all proceedings and causes arising under 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; also, in all causes arising under 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight; also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March fourth, nineteen hundred and seven; also, in all causes arising under 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved, March second, eighteen hundred and ninety-three; and, also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon a petition of any party thereto, that the proceedings, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error," (38 Stat. 804, 39 Stat.)

**§ 3. Stay by Court of Appeals.**

The Circuit Court of Appeals has power and usually does grant stays of execution for a limited time to enable the defeated

party to apply for a writ of certiorari. The court, however, exacts the utmost diligence in the matter of presentation of the petition to the Supreme Court of the United States.<sup>1</sup>

**§ 4. Circuit Court of Appeals has no power to allow certiorari to Supreme Court.**

A writ of certiorari cannot be allowed by the U. S. Circuit Court of Appeals; the proper remedy to review a judgment of conviction made by the District Court is by writ of error and not certiorari.<sup>2</sup>

**§ 5. Instructions relative to applications for writs of certiorari under Act of March 3, 1891, issued by the clerk of the U. S. Supreme Court.**

The following are the requirements on applications for writs of certiorari under the Act of March 3, 1891:

“Petitions are docketed in this Court as———, Petitioner, v.——— Respondent.

“Before the petition will be docketed there must be furnished this office:

“ (1) An original petition with written signature of counsel.

“ (2) A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.

“ (3) An appearance of counsel for petitioner, signed by a member of the bar of this Court.

“ (4) A deposit of twenty-five dollars (\$25.00) on account of costs.

“Before submission of the petition there must be furnished:

“ (1) Proof of service of notice of date fixed for submission and copies of petition and brief upon counsel for the respondent. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any in support of the same must be served on counsel for the respondent at least two weeks before such date except where the counsel to be notified resides west of the Rocky Mountains, in which case, the time shall be at least three weeks.

“ (2) Thirty (30) printed copies of the petition and brief in support of petition, if any such brief is to be filed, under one cover.

“ (3) At least nine (9) uncertified copies of the record, which must contain all of the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that Court. If a sufficient number of records thus made up cannot be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty (50) copies must be printed under my supervision in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

<sup>1</sup> In *Re Woods*, 143 U. S. 202, 12 Sup. Ct. Rep. 417, 36 L. Ed. 125.

<sup>2</sup> *Whitney v. Dick*, 202 U. S. 132, 26 Sup. Ct. Rep. 584, 50 L. Ed. 963.

"Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

"If a respondent desires to oppose a petition, thirty (30) copies of a brief for such respondent must be filed. These briefs must bear the name of a member of the bar of this court, who must also enter an appearance for the respondent. It is not necessary, however, for such counsel to be present in court when the petition is submitted.

"All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition."

## § 6. Contents of Petition—Notice.

Section 3 of Supreme Court rule 37 provides:

"§ 3. Where an application is submitted to this court for a writ of certiorari to review a decision of a Circuit Court of Appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

## § 7. Time limit for application.

Three months is the limit within which a defeated party may apply to the U. S. Supreme Court for a writ of certiorari.<sup>2</sup>

Reasonable promptness is required.<sup>3</sup>

<sup>1</sup> For Form Petition for Certiorari, see Appendix.

<sup>2</sup> § 1228a, Act Sept. 6, 1916, c. 448, § 6.

<sup>3</sup> The Conqueror, 166 U. S. 110, 17 Sup. Ct. Rep. 510, 41 L. Ed. 937.

**§ 8. Petition may be filed during adjournment or in vacation.**

Section 4 of Rule 37 was amended on March 26, 1917, and provides:

"4. An application for a writ of certiorari will be deemed in time when the petition therefor, accompanied by the printed record and brief, is filed within the period prescribed by law: Provided this is followed by submitting the petition in open court on some motion day not later than the first one which follows a period of four weeks after such filing. Notice of the date of submission and copies of the petition and brief must be filed as required by Section 3 of this rule."

**§ 9. Review confined to errors specified in petition.**

The review is limited to the errors assigned in the petition for certiorari.<sup>1</sup>

**§ 10. Errors not raised in trial court and not in record.**

The Supreme Court will not consider errors which were not raised in the court below.<sup>2</sup>

Although certiorari brings up the whole record.<sup>3</sup>

Only matters appearing in the record will be examined.<sup>4</sup>

**§ 11. At what stage certiorari may issue.**

(a) It was held that the Supreme Court of the United States has the power to require any case to be sent to it for review at any time and at any state of the proceedings either before or after judgment.<sup>5</sup> But the question is now open whether, under the Act of September 6, 1916, providing that *certiorari* may be al-

<sup>1</sup> Montana Mining Co. v. St. Louis, 186 U. S. 31, 22 Sup. Ct. Rep. 744, 46 L. Ed. 1039; Hubbard v. Todd, 171 U. S. 474, 19 Sup. Ct. Rep. 14, 43 L. Ed. 246.

<sup>2</sup> Saltonstall v. Birtwell, 164 U. S. 70, 17 Sup. Ct. Rep. 19, 41 L. Ed. 348.

<sup>3</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. Rep. 751, 47 L. Ed. 1061.

<sup>4</sup> Green County v. Quinlan, 211 U. S. 582, 29 Sup. Ct. Rep. 162, 53 L. Ed. 335.

<sup>5</sup> Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 36 Sup. Ct. Rep. 269, 60 L. ed. 629, holding also that refusal of writ not a bar to second application after final judgment. American Construction Co. Jacksonville R. R. Co., 148 U. S. 372, 13 Sup. Ct. Rep. 158, 37 L. Ed. 486; The Conqueror, 166 U. S. 113, 17 Sup. Ct. Rep. 510, 41 L. Ed. 939; U. S. v. Three Friends, 166 U. S. 2-5, 17 Sup. Ct. Rep. 495, 41 L. Ed. 897; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

lowed "after entry of judgment or decree," the authority to grant such writ before final judgment has not been taken away. It may be directed to the trial Court.<sup>1</sup>

(b) The Supreme Court as a rule declines to issue writs of certiorari before the U. S. Circuit Court of Appeals has finally passed on the case.<sup>2</sup>

But circumstances may arise when the writ may be awarded before the decision of the case by the Court of Appeals.<sup>3</sup>

### § 12. Scope of review.

(a) On certiorari the Supreme Court of the United States, upon proper assignments of error, may examine every question in the case, although the Court of Appeals, by reason of a former decision made by it, was not in position to do so.<sup>4</sup>

(b) The Supreme Court may dispose of the entire case on the merits.<sup>5</sup>

### § 13. Questions not raised in trial court but passed upon by Court of Appeals may be reviewed.

The Supreme Court may consider the questions passed upon by the U. S. Court of Appeals, although they were not raised in the trial court.<sup>6</sup>

### § 14. Effect of refusal of Court of Appeals to take jurisdiction.

When a U. S. Circuit Court of Appeals erroneously refuses to entertain jurisdiction of a cause and a writ of certiorari was allowed bringing up the whole record, the Supreme Court of the United States, while having the power to do so, will not consider

<sup>1</sup>Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. Rep. 385, 40 L. ed. 782; ex parte Lange, 18 Wall. 166, 21 L. ed. 872.

<sup>2</sup>Panama Ry. Co. v. Napier Shipping Co., 166 U. S. 284, 17 Sup. Ct. Rep. 572, 41 L. Ed. 1004; The Conqueror, 166 U. S. 113, 17 Sup. Ct. Rep. 510, 41 L. Ed. 939; Good Shot v. U. S., 179 U. S. 87, 21 Sup. Ct. Rep. 33, 45 L. Ed. 101.

<sup>3</sup>The Conqueror, 166 U. S. 114, 17 Sup. Ct. Rep. 510, 41 L. Ed. 939.

<sup>4</sup>Panama Ry. Co. v. Napier Shipping Co., 166 U. S. 280, 17 Sup. Ct. Rep. 572, 41 L. Ed. 1004.

<sup>5</sup>Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. Rep. 657, 57 L. Ed. 1101.

<sup>6</sup>Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. Rep. 505, 57 L. Ed. 718.

the case on the merits, but will remand the cause to the Court of Appeals for decision on the merits.<sup>1</sup>

### § 15. Certiorari in interlocutory appeals.

The Supreme Court has power to review by certiorari a decision of the U. S. Circuit Court of Appeals made in an interlocutory appeal, but the power will be sparingly exercised.<sup>2</sup>

### § 16. More than one writ allowed—when.

More than one writ of certiorari may be applied for to review later proceedings.<sup>3</sup>

### § 17. No jurisdictional amount.

No jurisdictional amount is required on certiorari.<sup>4</sup>

### § 18. Administrative orders not reviewable.

A ruling by the postmaster general barring certain mail cannot be reviewed in the U. S. Supreme Court, by certiorari.<sup>5</sup>

But relief may be had in equity.<sup>6</sup>

### § 19. Certiorari will not lie where an appeal may be taken.

(a) The power conferred upon the United States Supreme Court by Sec. 240 of the Judicial Code to require, by writ of certiorari, that cases in the Circuit Courts of Appeals be certified there for review and determination, is plainly confined to that class of cases in which, according to the provisions of §§ 128 and 241, the final decrees and judgments of those courts are not reviewable upon appeal or writ of error; that is to say, if a case be one which may come there under Sec. 241 by appeal or writ of

<sup>1</sup> *Lutcher Lumber Co. v. Knight*, 217 U. S. 257, 30 Sup. Ct. Rep. 505, 54 L. Ed. 759; *Brown v. Fletcher*, 237 U. S. 583, 35 Sup. Ct. Rep. 750, 59 L. Ed. 1128; but see *Lamar v. U. S.*, 241 U. S. 103, 36 Sup. Ct. Rep. 535, 60 L. Ed. 912; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. Rep. 906, 44 L. Ed. 1088.

<sup>2</sup> *Denver v. New York Trust Co.*, 229 U. S. 123, 33 Sup. Ct. Rep. 657, 57 L. Ed. 1101.

<sup>3</sup> *Erie R. R. Co. v. Erie Transp. Co.*, 204 U. S. 220, 27 Sup. Ct. Rep. 246, 51 L. Ed. 450.

<sup>4</sup> *Whitney v. Dick*, 202 U. S. 132, 26 Sup. Ct. Rep. 584, 50 L. Ed. 963.

<sup>5</sup> *Degge v. Hitchcock*, 229 U. S. 162, 164, 33 Sup. Ct. Rep. 639, 57 L. Ed. 1135.

<sup>6</sup> *American School v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 Sup. Ct. Rep. 33; *Philadelphia Co. v. Stimson*, 223 U. S. 620, 56 L. Ed. 576, 32 Sup. Ct. Rep. 340; *Degge v. Hitchcock*, 229 U. S. 162, 164, 33 Sup. Ct. Rep. 639, 57 L. Ed. 1135.

error after a final decree or judgment in the Circuit Court of Appeals, it is not a case which may be brought there by certiorari under Sec. 240. It is not intended that these two modes of exercising appellate authority over the Circuit Courts of Appeals, one upon appeal or writ of error and the other upon certiorari shall be co-existent with respect to any case or class of cases, but rather that the former, where it exists at all, shall be exclusive.<sup>1</sup>

(b) Decrees of the Circuit Court of Appeals in trademark cases are not reviewable by appeal, the remedy by certiorari is exclusive.<sup>2</sup>

(c) Neither appeal nor error lies to review a judgment and sentence for contempt, the remedy by certiorari being exclusive.<sup>3</sup>

(d) A decree of the Circuit Court of Appeals in an admiralty case can be reviewed in the U. S. Supreme Court only by a writ of certiorari.<sup>4</sup>

(e) Certiorari and not appeal is the remedy to review a judgment of the Circuit Court of Appeals in a habeas corpus case directing the deportation of an alien woman.<sup>5</sup>

(f) Certiorari and not error is the proper mode to review a judgment of the United States Circuit Court of Appeals in a criminal case.<sup>6</sup>

<sup>1</sup> *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. Ed. 340, 344, 12 Sup. Ct. Rep. 517; *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, 385, 37 L. Ed. 486, 491, 13 Sup. Ct. Rep. 758; *Forsyth v. Hammond*, 166 U. S. 506, 513, 514, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665; *United States v. Beatty, et al*, 232 U. S. 463, 34 Sup. Ct. Rep. 392, 58 L. Ed. 686; *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. Rep. 512, 52 L. Ed. 835.

<sup>2</sup> *Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348, 353, 34 Sup. Ct. Rep. 73, 58 L. Ed. 262; *Hutchinson P. & Co. v. Loewy*, 217 U. S. 457, 30 Sup. Ct. Rep. 613, 54 L. Ed. 838.

<sup>3</sup> *Gompers v. U. S.*, 233 U. S. 604, 34 Sup. Ct. Rep. 693, 58 L. Ed. 1115; *In re Chetwood*, 165 U. S. 443, 17 Sup. Ct. Rep. 385, 41 L. Ed. 782; *In re Debs*, 158 U. S. 573, 15 Sup. Ct. Rep. 900, 39 L. Ed. 1095.

<sup>4</sup> *U. S. v. Three Friends*, 166 U. S. 2-5, 17 Sup. Ct. Rep. 495, 41 L. Ed. 897.

<sup>5</sup> *Lapine v. Williams*, 232 U. S. 78, 34 Sup. Ct. Rep. 196, 58 L. Ed. 515.

<sup>6</sup> *Cameron v. United States*, 231 U. S. 710, 34 Sup. Ct. Rep. 244, 58 L. Ed. 448.



**§ 20. Where both certiorari and writ of error may be resorted to.**

In doubtful cases where it is desirable to obtain a complete adjudication upon the merits, the writ of error and certiorari may be employed.<sup>1</sup>

**§ 21. When the writ of certiorari will lie.**

(a) "The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what *exceptional facts* may arise to call for its use."<sup>2</sup>

(b) A writ of certiorari is not issued as a matter of right. The issuance of it rests in the discretion of the Supreme Court. It is granted only in cases of gravity and importance. It is a power sparingly exercised.<sup>3</sup>

(c) The writ will be allowed to correct excesses of jurisdiction and in furtherance of justice.<sup>4</sup>

(d) The power to issue writs of certiorari is sufficient to vest in the Supreme Court of the United States final control over litigation in all Courts of Appeals.<sup>5</sup>

(e) It will be issued to avoid a conflict between the State Courts and Federal Courts of Appeal.<sup>5</sup>

(f) Or, if the subject matter affects the interest of this nation.<sup>5</sup>

(g) On an application of a Russian vice-consul, certiorari

<sup>1</sup> Johnson v. Southern Pac. Co., 196 U. S. 1, 25, 25 Sup. Ct. Rep. 158, 49 L. Ed. 363.

<sup>2</sup> Degge v. Hitchcock, 229 U. S. 162, 36 Sup. Ct. Rep. 639, 57 L. Ed. 1135.

<sup>3</sup> Hamilton Brown Shoe Co. v. Wolf Bros. 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629; United States v. Three Friends, 166 U. S. 1, 17 Sup. Ct. Rep. 495, 41 L. Ed. 897; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095; American Construction Company v. Jacksonville T. K. W. R. Co., 148 U. S. 372, 13 Sup. Ct. Rep. 158, 37 L. Ed. 486; Re Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. Rep. 43, 35 L. Ed. 868; Re Lau Ow Bew, 144 U. S. 47, 12 Sup. Ct. Rep. 517, 36 L. Ed. 340.

<sup>4</sup> In re Chetwood, 165 U. S. 443, 17 Sup. Ct. Rep. 385, 41 L. Ed. 783; In re Sachs, 190 U. S. 1, 23 Sup. Ct. Rep. 718, 47 L. Ed. 933.

<sup>5</sup> Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

was allowed to review an order discharging a deserted seaman from a Russian vessel.<sup>1</sup>

(h) Certiorari may be granted where the judges of the U. S. Court of Appeals are divided upon a question of law.<sup>2</sup>

(i) It will be issued to insure the uniformity of the law where the decisions in the different Circuit Courts of Appeal are conflicting on points of law.<sup>3</sup>

(j) Certiorari has been granted in patent cases where the different courts of appeal have rendered conflicting decisions as to the validity of the same patent.<sup>4</sup>

(k) Certiorari will issue in a case which was heard by a judge or judges who were disqualified to hear it.<sup>5</sup>

(l) Where the jurisdiction of the Circuit Court of Appeals was involved.<sup>6</sup>

(m) The Supreme Court has allowed very few writs of certiorari in criminal cases.

(n) Certiorari will not be granted where the only difference in the result would be to affirm without prejudice.<sup>7</sup>

(o) In many cases it was granted on application of the Government.

### § 22. Effect of allowance of the writ.

The allowance of the writ of certiorari suspends the operation of the mandate of the U. S. Circuit Court of Appeals and all action in the court where the case was tried.<sup>8</sup>

<sup>1</sup> Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. Rep. 195, 46 L. Ed. 264.

<sup>2</sup> Delk v. St. Louis R. R. Co., 220 U. S. 580, 31 Sup. Ct. Rep. 617, 55 L. Ed. 590.

<sup>3</sup> Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. Rep. 683, 55 L. Ed. 842.

<sup>4</sup> Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 428, 31 Sup. Ct. Rep. 444, 55 L. Ed. 527.

<sup>5</sup> Cramp & Sons v. Int. C. M. T. Co., 228 U. S. 645, 33 Sup. Ct. Rep. 722, 57 L. Ed. 1003; American Const. Co. v. Jacksonville R. R. Co., 148 U. S. 372, 13 Sup. Ct. Rep. 153, 37 L. Ed. 486.

<sup>6</sup> Pennsylvania Coal Co. v. Cassett, 207 U. S. 187, 28 Sup. Ct. Rep. 110, 52 L. Ed. 163.

<sup>7</sup> Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810.

<sup>8</sup> Louisville & N. R. R. Co. v. Louisville Trust Co., 78 Fed. 659.

But the court below is permitted to perfect its judgment and grant leave to make a remittitur.<sup>1</sup>

**§ 23. Mandate on certiorari.**

Upon a reversal of a judgment of the Court of Appeals on certiorari, the Supreme Court of the United States may in its discretion remand the cause to that court instead of to the trial court.<sup>2</sup>

**§ 24. Refusal of writ—effect of.**

A denial of the writ is not equivalent to an affirmance.<sup>3</sup>

<sup>1</sup> *Hovey v. McDonald*, 109 U. S. 157, 3 Sup. Ct. Rep. 136, 27 L. Ed. 890.

<sup>2</sup> *Lutcher v. Lumber Co.*, 217 U. S. 257, 30 Sup. Ct. Rep. 505, 54 L. Ed. 757.

<sup>3</sup> *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 36 Sup. Ct. Rep. 60 L. Ed. 629.

## CHAPTER IX

### Review of Decisions of the Highest Courts of the State—Jurisdiction of the Supreme Court over State Courts

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§ 1. Method of review—by writ of error or certiorari.

A final judgment at law or a decree in equity rendered by the highest court of a state is reviewable in the Supreme Court of the United States pursuant to the Act of September 6, 1916, Chapter 448, Paragraph 2, (see § 5 following), either by writ of error or certiorari and never by appeal.

§ 2. When either error or certiorari may be invoked.

Under the said Act of September 6, 1916, the aggrieved party has the choice of selecting the mode of review, either by writ of error or certiorari, but only in the following classes of cases:

(a) where the *validity* of a treaty or statute of, or an authority exercised under the United States was drawn in question and the decision was in favor of or against their validity; and

(b) where the question of the *validity* of a statute of, or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States was drawn in question and the decision was either for or against their validity.

**§ 3. Where validity of a law is not challenged, the propriety of Federal claim is reviewable only by certiorari.**

Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision of the highest court of the State is either in favor of or against the title, right, privilege, or immunity especially set up or claimed by either party under such constitution, treaty, statute, commission, or authority, the right to review such judgment is limited to a proceeding by certiorari.

Act September 6, 1916, Chap. 448, ¶ 2.

**§ 4. Distinction between writ of error and certiorari.**

The cardinal difference between the two modes of procedure is this:

Where a Federal question was properly raised in the record a writ of error may be sued out in the classes of cases above indicated as a matter of right; whereas certiorari is a discretionary writ and is allowed only in exceptional and extraordinary cases, mainly to settle questions of law upon which there is a conflict of decisions or where the question involved is of great public importance. (See Certiorari, Chap. VIII.)

**§ 5. The Act of September 6, 1916.**

The Act is as follows:

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

(Jud. Code, § 237, as amended, Act Dec. 23, 1914, c. 2, and Act Sept. 6, 1916, c. 448, § 2.)

### § 6. No jurisdictional amount required.

The jurisdictional amount required in cases of appeals and writs of error from the judgments and decrees of the courts of the United States has no application to writs of error from State Courts in which class of cases a review may be had regardless of the amount involved.<sup>1</sup>

### § 7. Federal law controls procedure.

Section 1003 of the Revised Statutes of the U. S. provides that "writs of error from the Supreme Court of the U. S. to a State Court in cases authorized by law, shall be issued in the same manner, and under same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the U. S."

### § 8. Writ of error—by whom allowed.

A writ of error from the Supreme Court of the United States to the highest courts of a State may be allowed by a justice of the United States Supreme Court or by the Chief Justice of the State Court in which the judgment or decree was rendered, but not by an associate justice of such State Court. If the judgment was rendered by a court having no chief justice, then it may be

<sup>1</sup> The Habana, 175 U. S. 683, 20 Sup. Ct. Rep. 290, 44 L. Ed. 322.



allowed by the judge of the court in which the judgment or decree was entered. An order allowing the writ is necessary.<sup>1</sup>

**§ 9. Procedure indicated.**

Except for the difference in the method of allowance of the writ of error as pointed out in the preceding section, the practice of obtaining a review of a judgment or decree of the highest court of a state follows the procedure in writs of error from judgments of Federal courts. A petition for writ of error with proper assignment of errors, a bond and a citation together with an order for allowance of the writ constitute the set of papers required for presentation to the Judge or Justice allowing the writ. (For forms of petition, assignment of errors, bond, and citation, etc., see appendix, and see also Chap. XV. §§ 17-48 of this book.)

**§ 10. Procedure on certiorari.**

The procedure on certiorari to the U. S. Supreme Court is exactly the same as upon application to review a judgment of the U. S. Circuit Court of Appeals. (For forms, see appendix, and see "Certiorari," Chap. VIII. of this book.)

**§ 11. Time for suing out writ of error or certiorari.**

A writ of error or certiorari to review a judgment or decree of the highest court of a state must be sued out within *three months* from the date of entry of the judgment or decree.<sup>2</sup>

**§ 12. Decisions reviewable—final determination necessary.**

In order to obtain a review by writ of error, the judgment or decree of the highest court of a state must be final in its nature.<sup>3</sup>

**§ 13. What constitutes a final adjudication.**

A final judgment or decree, within the meaning of the act regulating appeals or writs of error to the Supreme Court of the United States, is one that terminates the litigation on the merits,

<sup>1</sup> Section 299 Rev. Stat. of the U. S.; *Havnor v. New York*, 170 U. S., 408, 42 L. Ed. 1087, 18 Sup. Ct. Rep. 631; *Northwestern Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588, 20 L. Ed. 463, 14 Sup. Ct. 1168.

<sup>2</sup> Section 1228a, Act Sept. 6, 1916, c. 448, § 6. See *Certiorari*, Chap. VIII.

<sup>3</sup> Sect. 237 of the Federal Judicial Code.

so that in case of affirmance the court below will have nothing to do but to execute the judgment or decree it originally rendered.<sup>1</sup>

**§ 14. When reservation in decree does not affect its finality.**

And the rule is the same where the rights of the parties are substantially adjusted although something still remains to be done.<sup>2</sup>

**§ 15. When a decree of foreclosure is final.**

A decree of foreclosure proceedings is final when it fixes the amount of the debt, directs a sale, or adjudges the rights of the different claimants.<sup>3</sup>

**§ 16. The jurisdiction of the U. S. Supreme Court not affected by form of judgment, provided it is final.**

It is enough for the jurisdiction of the Supreme Court of the United States that there was a final judgment entered by the highest court of the state. Whenever the highest court of the state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise

<sup>1</sup>Mt. Vernon Woodberry Cotton Co. v. Alabama I. P. Co., 240 U.S. 30, 36 Sup. Ct. Rep. 234, 60 L. Ed. 507; Detroit & M. R. Co. v. Michigan R. R. Commission, 240 U. S. 564, 36 Sup. Ct. Rep. 424, 60 L. Ed. 802; Rio Grande W. R. Co. v. Stringham, 239 U. S. 44, 36 Sup. Ct. Rep. 5, 60 L. Ed. 136; Illinois ex rel. Gersch v. Chicago, 226 U. S. 451, 57 L. Ed. 295; Louisiana Navigation Co. v. Oyster Commission, 226 U. S. 99, 57 L. Ed. 138; Chesapeake & O. R. R. Co. v. McCabe, 213 U. S. 207, 53 L. Ed. 765; McLaughlin v. Hallowell, 228 U. S. 278, 57 L. Ed. 835; Missouri & K. I. Co. v. Olathe, 222 U. S. 185, 56 L. Ed. 155; Schlosser v. Hemphill, 198 U. S. 173, 49 L. Ed. 1001, 25 Sup. Ct. Rep. 654; Great Western Tele. Co. v. Burnham, 162 U. S. 339, 40 L. Ed. 991, 16 Sup. Ct. Rep. 850; Ex parte Norton, 108 U. S. 237, 2 Sup. Ct. Rep. 390, 27 L. Ed. 709; Wurts v. Hoagland, 105 U. S. 701, 15 Otto 701, 26 L. Ed. 1109; Bostwick v. Brinkerhoff, 106 U. S. 3, 16 Otto 3, 27 L. Ed. 73; Grant v. Phoenix Mutual Life Ins. Co., 106 U. S. 429, 16 Otto 429, 1 Sup. Ct. 414, 27 L. Ed. 237; St. Louis I. M. & S. R. Co., v. Southern Exp. Co., 108 U. S. 24, 27 L. Ed. 638, 2 Sup. Ct. Rep. 6; Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 480; Buell v. Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

<sup>2</sup>Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. Rep. 389, 56 L. Ed. 594.

<sup>3</sup>In re Norton, 108 U. S. 237, 27 L. Ed. 709, 2 Sup. Ct. Rep. 490; Green v. Fisk, 103 U. S. 518, 13 Otto 518, 26 L. Ed. 485; North Carolina R. R. Co. v. Swasey, 23 Wall. 405, 23 L. Ed. 136; Bronson v. R. R. Co. 2 Black 524, 17 L. Ed. 359; Whiting v. Bank of the U. S., 13 Pet. 6, 10 L. Ed. 33; Ray v. Law, 3 Cranch 179, 2 L. Ed. 404.

appellate authority, the jurisdiction of the Supreme Court of the United States to review such decision, if it involve a Federal question, will upon a proper proceeding attach.<sup>1</sup>

**§ 17. When decision not reviewable.**

(a) An order of a judge in chambers on habeas corpus is not a final judgment of the court.<sup>2</sup>

(b) Where cause is remanded with directions to enter judgment writ will not lie until the judgment is entered in accordance with direction as appears in the record.<sup>3</sup>

(c) When the highest court of a state reverses a judgment of the lower court and remands it for further proceedings, a writ of error cannot be sued out from the United States Supreme Court until the highest court of the state has again affirmed the judgment.<sup>4</sup>

**§ 18. Moot questions not reviewable.**

See Chapter II., §§ 43-46, on moot questions.

**§ 19. "Highest state court"—defined.**

By the term, "the highest court of a state," is meant the highest court to which, under the laws of the state, the case could have been appealed and which passed on the case.<sup>5</sup>

**§ 20. When an inferior court may be so regarded.**

Therefore a judgment of an inferior court is of equal dignity for the purposes of review with that of the highest court of the

<sup>1</sup> Mt. Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 36 Sup. Ct. Rep. 234, 60 L. Ed. 507; Williams v. Bruffy, 102 U. S. 255, 26 L. Ed. 135; Stevens v. Griffith, 111 U. S. 50, 28 L. Ed. 348, 4 Sup. Ct. Rep. 283; Virginia Coupon cases, 114 U. S. 310, 29 L. Ed. 199.

<sup>2</sup> Clarke v. McDade, 165 U. S. 168, 41 L. Ed. 673, 17 Sup. Ct. Rep. 284; McKnight v. James, 155 U. S. 685, 39 L. Ed. 310, 15 Sup. Ct. Rep. 248; Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967, 11 Sup. Ct. Rep. 301.

<sup>3</sup> Union M. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. Ed. 461, 16 Sup. Ct. Rep. 318; Rice v. Sanger, 144 U. S. 197, 36 L. Ed. 403, 12 Sup. Ct. Rep. 664; Commissioners v. Lucas, 93 U. S. 108, 23 L. Ed. 822.

<sup>4</sup> Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027, 35 Sup. Ct. Rep. 625.

<sup>5</sup> Stratton v. Stratton, 239 U. S. 55, 36 Sup. Ct. Rep. 26, 60 L. Ed. 142.

state if no method of review is provided from such court to a higher court in the particular class of cases.<sup>1</sup>

### § 21. When highest court refuses to entertain jurisdiction.

And the same rule applies to a case where an application was made to the highest court of the state for an appeal or writ of error and the latter refused it; or, if after allowing the same, the higher court declined to entertain jurisdiction. In either case, the writ of error should be addressed to the inferior court.<sup>2</sup>

### § 22. Every method of obtaining review must be exhausted.

Although the judgment of an intermediate appellate court is made final by statute, yet where a discretionary power to review the judgment exists in the highest court of the State, it is imperative that the remedy provided by the local law be first exhausted before an application for a writ of error is made to the Supreme Court of the United States.<sup>3</sup>

### § 23. In New York—to which Court Writ Addressed.

In view of the fact that the reviewing courts in the State of New York after judgment do not retain the record, but remit it to the court below, it has been held that a writ of error to review a judgment of the highest court of that state may be addressed to the inferior court having actual custody and control of the record, and not to the Court of Appeals.<sup>4</sup>

<sup>1</sup> Mullen v. Western Union Beef Co., 173 U. S. 116, 43 L. Ed. 635, 19 Sup. Ct. Rep. 404; Tinsley v. Anderson, 171 U. S. 101, 43 L. Ed. 91, 18 Sup. Ct. Rep. 805; Newport Light Co. v. Newport, 151 U. S. 527, 38 L. Ed. 259, 14 Sup. Ct. Rep. 429; Fisher v. Perkins, 122 U. S. 522, 30 L. Ed. 1192, 7 Sup. Ct. Rep. 1227.

<sup>2</sup> San Antonio and A. P. R. Co. v. Wagner, 241 U. S. 476, 36 Sup. Ct. Rep. 626, 60 L. Ed. 1110; Kanawha & Michigan Railway Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. Rep. 174; Bergeman v. Backer, 157 U. S. 655, 39 L. Ed. 845, 15 Sup. Ct. Rep. 727; Lane v. Wallace, 104 U. S. 77, 26 L. Ed. 703.

<sup>3</sup> Stratton v. Stratton, 239 U. S. 55, 36 Sup. Ct. Rep. 26, 60 L. Ed. 142; Fisher v. Perkins, 122 U. S. 522, 30 L. Ed. 1192, 7 Sup. Ct. Rep. 1227; Mullen v. Western Union Beef Co., 173 U. S. 116, 43 L. Ed. 635, 19 Sup. Ct. Rep. 404; Western Union Tel. Co. v. Crovo, 220 U. S. 364; Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 32 Sup. Ct. Rep. 264, 56 L. Ed. 1082; St. Louis, San Francisco Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. Rep. 651, 57 L. Ed. 1129.

<sup>4</sup> Green v. Buskirk, 3 Wall. 448, 18 L. Ed. 245; Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 396.

And this is the rule for other jurisdictions where the same condition exists.<sup>1</sup>

The writ of error may be addressed either to the highest court or inferior court in the State of New York. The better practice seems to be to direct the writ to the court which has the record in its custody and control.<sup>2</sup>

#### § 24. Who may sue out writ of error.

(a) Only parties to the record in the court below may sue out or be made defendants to a writ of error.<sup>3</sup>

(b) And such parties must have a personal, as distinguished from an "official" interest in the result of the litigation.<sup>4</sup>

#### § 25. Who must be named as plaintiffs in error—joint parties.

Where the interests of the parties are joint, the writ must be sued out in the name of *all* joint plaintiffs or joint defendants, or the writ will be dismissed.<sup>5</sup>

#### § 26. When interests are separate.

But where a judgment or decree is several both in form and substance, a writ of error may be sued out by any party to the record to protect his own interests.<sup>6</sup>

#### § 27. Severing the record—practice—notice.

If one of several co-parties desires to sue out a writ of error, and the others refuse to join in same, he may give notice to such

<sup>1</sup> Stanley v. Schwalby, 162 U. S. 255, 40 L. Ed. 960, 16 Sup. Ct. Rep. 754; Rothchild v. Knight, 184 U. S. 334, 46 L. Ed. 573, 22 Sup. Ct. Rep. 391; Wedding v. Meyler, 192 U. S. 573, 48 L. Ed. 570, 24 Sup. Ct. Rep. 322.

<sup>2</sup> Atherton v. Fowler, 91 U. S. 146, 23 L. Ed. 265.

<sup>3</sup> Payne v. Niles, 20 How. 219, 15 L. Ed. 895; Bayard v. Lombard, 9 How. 530, 13 L. Ed. 245; In re Cockcroft, 104 U. S. 578, 26 L. Ed. 856; Indiana S. R. Co. v. Liverpool L. & G. Ins. Co., 109 U. S. 168, 3 Sup. Ct. Rep. 108, 27 L. Ed. 895; South Carolina v. Weseley, 155 U. S. 542, 15 Sup. Ct. Rep. 230, 39 L. Ed. 254; Georgia v. Jessup, 106 U. S. 458, 1 Sup. Ct. Rep. 363, 27 L. Ed. 216.

<sup>4</sup> Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. Rep. 15, 60 L. Ed. 120; Smith v. Indiana, 191 U. S. 138, 48 L. Ed. 125, 24 Sup. Ct. Rep. 51; Marshall v. Dye, 231 U. S. 250, 34 Sup. Ct. Rep. 92, 58 L. Ed. 206.

<sup>5</sup> Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. Rep. 39, 36 L. Ed. 933.

<sup>6</sup> Cox v. United States, 6 Pet. 172, 8 L. Ed. 359; Gilfillan v. McKee, 159 U. S. 303, 40 L. Ed. 161, 16 Sup. Ct. Rep. 6; Todd v. Daniel, 16 Pet. 521, 10 L. Ed. 1054; German v. Mason, 12 Wall. 259, 20 L. Ed. 392.

co-party of his intention to do so, whereupon the writ may be issued as if such parties had joined in the writ.<sup>1</sup>

**§ 28. Raising a Federal question—jurisdictional pre-requisite.**

In order to confer upon the Supreme Court of the United States jurisdiction to review a judgment or decree of a state court, by reason of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear from the record itself that such title, right, privilege, or immunity was “specially set up or claimed.” The method of raising is:

- (a) By an adequate specification or an appropriate pleading,
- (b) By motion,
- (c) By exception,

(d) By other action, being made part of the record or in some other mode permissible under the local practice, at the proper time and in the proper way, showing that the Federal claim or right was presented to the Court.<sup>2</sup>

**§ 29. Federal right must be positively asserted.**

The assertion of the Federal right must be made unmistakably, and not left to mere inference.<sup>3</sup>

**§ 30. Specific section of statute or Constitution must be set out.**

And the Federal statute or section of the Constitution relied

<sup>1</sup> Masterson v. Henderson, 10 Wall. 418, 19 L. Ed. 954; Dowd v. Russell, 14 Wall. 402. For form of notice and mode of procedure see Appendix, Form No. 53.

<sup>2</sup> Int. Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. Rep. 199, 58 L. Ed. 1276; Atchinson T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901; Adams v. Russell, 229 U. S. 353, 57 L. Ed. 1224; El Paso & S. R. Co. v. Eichel, 226 U. S. 590, 57 L. Ed. 369; Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. Ed. 921, 36 Sup. Ct. Rep. 57; Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 308, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 22 Sup. Ct. Rep. 120, 46 L. Ed. 171; Loeb v. Columbia Twp., 179 U. S. 472, 21 Sup. Ct. Rep. 174, 45 L. Ed. 280.

<sup>3</sup> Kansas City Western R. R. Co. v. Adow, 240 U. S. 51, 36 Sup. Ct. Rep. 252, 60 L. Ed. 520; Southern R. R. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. Rep. 210, 60 L. Ed. 402; Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 308, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709.

upon should be stated with particularity, or the writ of error may be dismissed for want of jurisdiction.<sup>1</sup>

### § 31. Confounding the Fifth Amendment with the Fourteenth.

The Fifth Amendment to the Constitution of the United States relates exclusively to procedure in the Federal courts, and the state courts are not bound to give it effect. The Fourteenth Amendment and not the Fifth controls the action of the State and its courts.<sup>2</sup>

Nor are the state courts bound by the procedure laid down by the seventh amendment.<sup>3</sup>

### § 32. Issue of law must be definite.

A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such a Federal question by its decision.<sup>4</sup>

### § 33. Federal claim cannot be spelled out by resort to judicial knowledge.

Jurisdiction may be maintained where a definite issue as to the possession of the Federal right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge.<sup>5</sup>

<sup>1</sup> *Harding v. Illinois*, 196 U. S. 78, 25 Sup. Ct. Rep. 176, 49 L. Ed. 394; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. Ed. 480, 23 Sup. Ct. Rep. 375; *Hooker v. Los Angeles*, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487; *Home for Incurables v. New York*, 187 U. S. 155, 23 Sup. Ct. Rep. 84, 47 L. Ed. 117; *Erie R. R. Co. v. Purdy*, 185 U. S. 148, 22 Sup. Ct. Rep. 605, 46 L. Ed. 847; *Oxley Stave Co. v. Butler Co.*, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709.

<sup>2</sup> *Ensign v. Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. Rep. 592, 57 L. Ed. 658.

<sup>3</sup> *St. Louis and Kansas City Land Co. v. Kansas City*, 241 U. S. 419, 36 Sup. Ct. Rep. 647, 60 L. Ed. 1072.

<sup>4</sup> *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 228 U. S. 596, 57 L. Ed. 982, 33 Sup. Ct. Rep. 596; *Powell v. Brunswick County*, 150 U. S. 433, 14 Sup. Ct. Rep. 166, 37 L. Ed. 1134.

<sup>5</sup> *Osborne v. Gray*, 241 U. S. 16, 36 Sup. Ct. Rep. 486, 60 L. Ed. 865; *Mutual Life Ins. Co. of New York v. McGrew*, 188 U. S. 308, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134, 14 Sup. Ct. Rep. 166; *Mountain View Min. & Mil. Co. v. McFadden*, 180 U. S. 533, 45 L. Ed. 656, 21 Sup. Ct. Rep. 488; *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185, 46 L. Ed. 144, 22 Sup. Ct. Rep. 47.

**§ 34. No special form required for raising Federal question.**

No particular form of words or phrase in which a claim of Federal rights must be asserted in a State court has ever been declared necessary by the Supreme Court of the United States.<sup>1</sup>

**§ 35. As a rule Federal question must be raised in trial court.**

The proper time to raise a Federal question is in the trial court. If the highest court of the State declines to pass upon the Federal point because not raised in time or in accordance with the local practice, the Supreme Court of the United States will decline to take jurisdiction of the case. But it is otherwise if the highest court of the State actually passes upon the Federal claim although defectively raised.<sup>2</sup>

The rule is universal that nothing which occurred in the progress of the trial can be assigned as error, unless it was brought to the attention of the court below, and passed upon, directly or indirectly.<sup>3</sup>

**§ 36. Setting up Federal claim in an assignment of errors—when proper.**

Where a Federal claim is set up for the first time in an assignment of error and the highest court of the State passes

<sup>1</sup> *Miles Salt Co. v. Board of Comm.*, 239 U. S. 478, 36 Sup. Ct. Rep. 264, 60 L. Ed. 392; *Green Bay, etc., v. Patten Paper Co.*, 172 U. S. 58, 19 Sup. Ct. Rep. 97, 43 L. Ed. 364; *Kaukauna v. Green Bay*, 142 U. S. 54, 12 Sup. Ct. Rep. 178, 35 L. Ed. 1004; *Powell v. Brunswick County*, 150 U. S. 433, 14 Sup. Ct. Rep. 166, 37 L. Ed. 1134; *C. B. & Q. R. R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979.

<sup>2</sup> *Mutual Life Ins. Co. of New York v. McGrew*, 188 U. S. 308, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; *Dill v. Ebbey*, 229 U. S. 199, 57 L. Ed. 1148; *Hulbert v. Chicago*, 202 U. S. 275, 26 Sup. Ct. Rep. 617, 50 L. Ed. 1026; *Cincinnati Packet Co. v. Green Bay*, 200 U. S. 179, 26 Sup. Ct. Rep. 208, 50 L. Ed. 428; *Marvin v. Trout*, 199 U. S. 212, 26 Sup. Ct. Rep. 31, 50 L. Ed. 157; *Hardin v. Illinois* 196 U. S. 78, 25 Sup. Ct. Rep. 176, 49 L. Ed. 394; *Layton v. Missouri*, 187 U. S. 356, 23 Sup. Ct. Rep. 137, 47 L. Ed. 214; *Jacobi v. Alabama*, 187 U. S. 133, 23 Sup. Ct. Rep. 48, 47 L. Ed. 106; *Erie R. R. Co. v. Purdy*, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. Rep. 605; *Columbia Water Power Co. v. Street Ry. Co.* 172 U. S. 475; *Oxley v. Butler County*, 166 U. S. 132; *Spies v. Illinois*, 123 U. S. 131 Sub nom.; *Ex parte Spies* 31 L. Ed. 80, 8 Sup. Ct. Rep. 21.

<sup>3</sup> *Wood v. Weimer*, 104 U. S. 786, 795, 26 L. Ed. 779.



on same in its opinion, it is equivalent for the purposes of jurisdiction, as if the point had been originally made in the trial court.<sup>1</sup>

### § 37. First raised in Appellate Court—when seasonable.

Although a Federal question was not presented by the pleadings, and was not raised in the trial court, nevertheless, if on appeal to the highest court of the State such question was presented and the court held that a Federal question was made before it according to its practice, and proceeded to determine it, the Supreme Court of the United States will regard the question as duly made and will entertain jurisdiction to review the same.<sup>2</sup>

### § 38. Not raised in highest court fatal.

Points not made in the highest courts of the State will not be considered by the United States Supreme Court.<sup>3</sup>

### § 39. Certificate of state Chief Justice insufficient to confer jurisdiction.

The fact that the Chief Justice of a state court allowed the writ of error, or certified the Federal question, is not of itself

<sup>1</sup> *San José Land and Water Co. v. San José Ranch Co.*, 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765; *Cincinnati Packet Co. v. Green Bay*, 200 U. S. 182, 26 Sup. Ct. Rep. 208, 50 L. Ed. 428.

<sup>2</sup> *Mallencrodt Works v. Jones*, 238 U. S. 41, 35 Sup. Ct. Rep. 671, 59 L. Ed. 1192; *North Carolina Railroad Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 581; *Miederich v. Lauenstein*, 232 U. S. 236, 58 L. Ed. 584; *Atchinson T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 62, 53 L. Ed. 695, 29 Sup. Ct. Rep. 397; *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 148, 52 L. Ed. 143, 146, 28 Sup. Ct. Rep. 34; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 299, 51 L. Ed. 490, 494, 27 Sup. Ct. Rep. 281; *Arrowsmith v. Harmoning*, 118 U. S. 194, 6 Sup. Ct. Rep. 1023, 30 L. Ed. 243; *San José L. & W. Co. v. San José R. Co.*, 189 U. S. 177, 179, 180, 47 L. Ed. 765, 766, 23 Sup. Ct. Rep. 487; *Erie Railroad Co. v. Purdy*, 185 U. S. 148, 22 Sup. Ct. Rep. 605, 46 L. Ed. 847; *Rothschild v. Knight*, 184 U. S. 334, 22 Sup. Ct. 391, 46 L. Ed. 573; *Sulley v. American National Bank*, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1072; *Mayer v. Richmond*, 172 U. S. 82, 19 Sup. Ct. Rep. 106, 43 L. Ed. 374.

<sup>3</sup> *Bullen v. Wisconsin*, 240 U. S. 625, 36 Sup. Ct. Rep. 473, 60 L. Ed. 830; *Chicago B. & Q. R. R. Co. v. R. R. Comm. of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926; *Illinois Central R. R. Co. v. Mulberry Hill Coal Co.* 238 U. S. 275, 35 Sup. Ct. Rep. 760, 59 L. Ed. 1306.

sufficient to show that a Federal question was involved. Such fact must appear from the record itself.<sup>1</sup>

**§ 40. When the state court impliedly passed upon Federal claim.**

There is, however, a well-defined exception to this rule, as where the record by necessary intendment, shows that a constitutional or Federal question is in the case, and that the State court could not have reached its decision without deciding the Federal question.<sup>2</sup>

**§ 41. Petitions, briefs, and assignment of errors insufficient to prove question raised.**

The petition for writ of error,<sup>3</sup> the briefs of counsel,<sup>4</sup> and the assignment of errors,<sup>5</sup> form no part of the record for the purpose of proving that the Federal question was duly raised in the court below. This must be shown by the pleadings or motion, ruling, or some other proceeding.

**§ 42. Federal question raised in petition for rehearing.**

A Federal claim is not properly raised when made for the first time in a petition for rehearing; or in the petition for writ of error; or in the briefs of counsel not made a part of the record.<sup>6</sup>

But when the court below entertained the petition for rehear-

<sup>1</sup> *Hulbert v. Chicago*, 202 U. S. 275, 280, 26 Sup. Ct. Rep. 617, 50 L. Ed. 1026; *Marvin v. Trout*, 199 U. S. 212, 223, 26 Sup. Ct. Rep. 31, 50 L. Ed. 157; *House of Incurables v. New York*, 187 U. S. 155, 23 Sup. Ct. Rep. 84, 47 L. Ed. 117; *Columbia Water Power Co. v. Street Railway Co.*, 172 U. S. 475, 487, 488, 19 Sup. Ct. Rep. 247, 43 L. Ed. 521.

<sup>2</sup> *Kelsey v. Filt*, 207 U. S. 50, 28 Sup. Ct. Rep. 43-60, 52 L. Ed. 95; *Wedding v. Meyers*, 192 U. S. 573, 24 Sup. Ct. Rep. 322, 48 L. Ed. 570; *San José Land & Water Co. v. San José*, 189 U. S. 177, 26 Sup. Ct. Rep. 208, 50 L. Ed. 448.

<sup>3</sup> *California Powder Works v. Davis*, 151 U. S. 389, 14 Sup. Ct. Rep. 350, 38 L. Ed. 206.

<sup>4</sup> *Sayward v. Denny*, 158 U. S. 180, 39 L. Ed. 941, 15 Sup. Ct. Rep. 777.

<sup>5</sup> *Fowler v. Lamson*, 164 U. S. 252, 41 L. Ed. 424, 17 Sup. Ct. Rep. 112.

<sup>6</sup> *St. Louis & S. F. R. Co. v. Shepherd*, 240 U. S. 240, 36 Sup. Ct. Rep. 274, 60 L. Ed. 622; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 308, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; *Zadig v. Baldwin*, 166 U. S. 488, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 639; *Sayward v. Denny*, 158 U. S. 180, 39 L. Ed. 941, 15 Sup. Ct. Rep. 777.

ing and specially passed upon the Federal questions it will be regarded as raised in proper time.<sup>1</sup>

### § 43. Local law not considered except when controlling Federal question.

Questions relating to local law will not be considered on a writ of error.<sup>2</sup>

Although the cause of action relied upon is based upon the Federal Constitution or statutes, nevertheless, on writ of error from the State courts the power to review is controlled by Section 237 of the Judicial Code, and the Court will not consider incidental questions not Federal in character.<sup>3</sup>

But so far as the judgment of the State court against the validity of and authority under the United States necessarily involves a decision of a question of local law, it will be reviewed by the United States Supreme Court whether that question depends upon the Constitution, laws, or treaties of the United States or upon the local law, or upon principles of general jurisprudence.<sup>4</sup>

### § 44. What the decision of State court must show.

The general rule is that it must clearly and unmistakably appear from the opinion of the highest court of the State that the

<sup>1</sup> *Consol. Turnpike v. Norfolk, etc., Ry. Co.*, 228 U. S. 326, 334, 32 Sup. Ct. Rep. 326, 57 L. Ed. 857; *Forbes v. State Council of Virginia*, 216 U. S. 396, 399, 30 Sup. Ct. Rep. 396, 54 L. Ed. 534; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 311, 23 Sup. Ct. Rep. 375, 47 L. Ed. 480; *Home for Incurables v. New York*, 187 U. S. 308, 23 Sup. Ct. Rep. 84, 47 L. Ed. 117; *Swerungen v. St. Louis*, 185 U. S. 38, 46 L. Ed. 799, 22 Sup. Ct. Rep. 569; *Mallet v. North Carolina*, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730; *Pim v. St. Louis*, 165 U. S. 273, 17 Sup. Ct. Rep. 322, 41 L. Ed. 714; *Loeber v. Schroeder*, 149 U. S. 580, 585, 13 Sup. Ct. 934, 37 L. Ed. 856.

<sup>2</sup> *Missouri ex rel. Hill v. Dockerey*, 191 U. S. 165, 48 L. Ed. 133, 24 Sup. Ct. Rep. 53; *Hammond v. Johnston*, 142 U. S. 73, 35 L. Ed. 941, 12 Sup. Ct. 141; *Henderson Bridge Co. v. Henderson*, 141 U. S. 679, 35 L. Ed. 900, 12 Sup. Ct. Rep. 114; *Robinson v. Iron Railway Co.*, 135 U. S. 522, 10 Sup. Ct. Rep. 907, 34 L. Ed. 277.

<sup>3</sup> *St. Louis I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 275, 57 L. Ed. 1179, 1185, 33 Sup. Ct. Rep. 858; *Rev. Stat. 709 (237, Judicial Code, 36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, 1214.)*; *U. Seaboard Air Line R. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. Rep. 790; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

<sup>4</sup> *Kansas City & Southern Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. Rep. 316.

Federal question was raised and actually decided and that the decision upon the Federal question was essential to the judgment rendered.<sup>1</sup>

**§ 45. Change of rule by recent legislation.**

Prior to the amendment of Sect. 237 of the Federal Judicial Code, the decisions all held that in order to obtain a review by writ of error the plaintiff in error must show that the Federal claim was decided adversely to him, but these decisions no longer apply, the rule having been changed by said amendment, which now permits a review of a case although the decision of the State court was in favor of the validity of the Federal claim.

**§ 46. When statement in State court's opinion insufficient.**

The fact that the State court in its opinion stated that it had "considered all of the questions" does not show that it had passed upon *any* Federal question.<sup>2</sup>

**§ 47. When omission to refer to Federal question not fatal to a review.**

But when the Federal question was properly presented and necessarily controls the determination of the case, the appellate jurisdiction of the United States Supreme Court cannot be defeated merely because the State court chose to put its decision upon some matter of local law.<sup>3</sup>

<sup>1</sup> *Heim v. McCall*, 239 U. S. 175, 36 Sup. Ct. Rep. 78, 60 L. Ed. 206; *Haire v. Rice*, 204 U. S. 291, 298, 27 Sup. Ct. Rep. 291, 51 L. Ed. 490; *Harding v. Illinois*, 196 U. S. 78, 85-86, 25 Sup. Ct. Rep. 176, 49 L. Ed. 394; *San José Land & Water Co. v. San José Ranch Co.*, 189 U. S. 177, 23 Sup. Ct. Rep. 487, 47 L. Ed. 765; *Columbia Water Power Co. v. Columbia Street Railway Co.*, 172 U. S. 475, 19 Sup. Ct. Rep. 247, 43 L. Ed. 521; *Clarke v. McDade*, 165 U. S. 168, 172, 17 Sup. Ct. Rep. 284, 41 L. Ed. 673; *Fowler v. Lamson*, 164 U. S. 252, 17 Sup. Ct. Rep. 112, 41 L. Ed. 424; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 576 (40: 536, 540), 16 Sup. Ct. Rep. 389, 40 L. Ed. 536; *California Powder Works v. Davis*, 151 U. S. 389-393 (38: 206, 207), 14 Sup. Ct. Rep. 350, 38 L. Ed. 206; *Eustis v. Bolles*, 150 U. S. 361 (37: 111), 14 Sup. Ct. Rep. 131, 37 L. Ed. 1111.

<sup>2</sup> *Consol. Turnpike v. Norfolk, etc.*, 228 U. S. 326, 32 Sup. Ct. Rep. 326, 57 L. Ed. 857; *Forbes v. State Council*, 216 U. S. 396, 30 Sup. Ct. Rep. 396, 54 L. Ed. 534.

<sup>3</sup> *Gaar Scott & Co. v. Shannon*, 223 U. S. 468, at 471, 32 Sup. Ct. Rep. 468, 56 L. Ed. 510; *West Chicago R. R. Co. v. Chicago*, 201 U. S. 506, 26 Sup. Ct. Rep. 518, 50 L. Ed. 845; *C. B. & Q. R. R. Co. v. People*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L.

If the judgment of affirmance necessarily denied Federal rights specially set up, a writ of error will lie, although the highest court of the State, in its opinion, did not expressly refer to the Federal Constitution.<sup>1</sup>

**§ 48. United States Supreme Court not limited to opinion of State court.**

In passing upon a question of jurisdiction, the United States Supreme Court is not limited to the opinion of the State court, but may consider the entire record.<sup>2</sup>

**§ 49. Misconstruction of Act of Congress—the record.**

It is not always necessary that the record of the proceedings of the highest court should state in terms a misconstruction by that court of an Act of Congress. It is enough that it is an inference of law that the highest court did in fact misconstrue an Act of Congress.<sup>3</sup>

See § 28 *et seq* of this chapter.

Ed. 596; Attorney-Gen. of the State of Michigan v. Lowry, 199 U. S. 233, 26 Sup. Ct. Rep. 27, 50 L. Ed. 167; American Exp. Co. v. State of Iowa, 196 U. S. 133, 25 Sup. Ct. Rep. 182, 49 L. Ed. 417; C. B. & Q. R. R. Co. v. State of Nebraska, 170 U. S. 57, 18 Sup. Ct. Rep. 513, 42 L. Ed. 948; C. & B. Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979; Chapman v. Goodnow, 123 U. S. 540, 8 Sup. Ct. Rep. 211, 31 L. Ed. 235.

<sup>1</sup> West Chicago St. Ry Co. v. City of Chicago, 201 U. S. 507, 26 Sup. Ct. Rep. 518, 50 L. Ed. 845; Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58, 19 Sup. Ct. 97, 43 L. Ed. 364; C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979; Roby v. Colehour, 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922; Chapman v. Goodnow, 123 U. S. 540, 8 Sup. Ct. Rep. 211, 31 L. Ed. 235.

<sup>2</sup> L. R. & W. Co. v. Behrman, 235 U. S. 164, 35 Sup. Ct. Rep. 62, 59 L. Ed. 175; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 376, 63 L. Ed. 1001, 1006, 34 Sup. Ct. Rep. 627; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 175, 54 L. Ed. 144, 147, 30 Sup. Ct. Rep. 40; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 76, 77, 44 L. Ed. 673, 679, 680, 20 Sup. Ct. Rep. 545; McCullough v. Virginia, 172 U. S. 102, 116, 43 L. Ed. 382, 387, 19 Sup. Ct. Rep. 134.

<sup>3</sup> Water Power Co. v. Street Railway Co., 172 U. S. 475, 488, 19 Sup. Ct. Rep. 247, 43 L. Ed. 521; Railroad Company v. Maryland, 21 Wall. 456, 466; Neilson v. Lagow, 12 How. 98, 109; Jones National Bank v. Yates, 240 U. S. 241, 36 Sup. Ct. 429, 60 L. Ed. 788; Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. Rep. 403, 56 L. Ed. 673; Grand Trunk Western R. R. Co. v. Lindsey, 223 U. S. 42, 58 L. Ed. 833, 34 Sup. Ct. Rep. 581.

### § 50. Frivolous Federal questions.

The assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of the United States Supreme Court invoked merely for purposes of delay.<sup>1</sup>

The existence of jurisdiction to review the judgments and decrees of the highest court of the State depends not merely upon form, but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous.<sup>2</sup>

Where a Federal question does exist, the writ of error will not be dismissed as frivolous, even when the case is foreclosed by former decisions, when an analysis of these decisions is necessary.<sup>3</sup>

### § 51. Judgments sustainable on non-Federal ground—cannot be reviewed.

When a record shows that two questions were presented by

<sup>1</sup> *Stewart v. Kansas City*, 239 U. S. 14, 36 Sup. Ct. Rep. 15, 60 L. Ed. 120; *Weber v. Fried*, 239 U. S. 325, 36 Sup. Ct. Rep. 131, 60 L. Ed. 308; *Parker v. McClain*, Ad. Sheets U. S. Supreme Court, June 15, 1916; *Catholic Missions v. Missoula County*, 200 U. S. 118; *Empire State Mining Co. v. Hanley*, 198 U. S. 292, 25 Sup. Ct. Rep. 691, 49 L. Ed. 1056; *Bonin v. Gulf Co.*, 198 U. S. 115, 25 Sup. Ct. Rep. 608, 49 L. Ed. 970; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 24 Sup. Ct. Rep. 553, 48 L. Ed. 795; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 24 Sup. Ct. Rep. 174, 48 L. Ed. 287; *Arbuckle v. Blackburn*, 191 U. S. 405, 24 Sup. Ct. Rep. 148; 48 L. Ed. 239; *Sawyer v. Piper*, 189, U. S. 154, 156, 47 L. Ed. 757, 758, 23 Sup. Ct. Rep. 633; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. Ed. 936, 941, 22 Sup. Ct. Rep. 691; *Wilson v. North Carolina*, 169 U. S. 586, 595, 42 L. Ed. 865, 871, 18 Sup. Ct. Rep. 435; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. Ed. 267, 13 Sup. Ct. Rep. 353.

<sup>2</sup> *Seaboard Air Line v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. Rep. 481. But compare with *Kansas City & Southern Ry. v. Albers Comm. Co.*, 223 U. S. 573, 32 Sup. Ct. Rep. 316, 56 L. Ed. 556.

<sup>3</sup> *Louisville & N. R. R. Co. v. Melton*, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. Rep. 676.

the pleadings—one Federal and one non-Federal—and that the judgment below rested upon a decision of the non-Federal question, the Supreme Court of the United States has no jurisdiction to review that judgment.<sup>1</sup>

**§ 52. Example—laches as a non-Federal ground.**

The ground of laches is broad enough to sustain a decree of a State court, and therefore, error would not lie to the Supreme Court of the United States.<sup>2</sup>

**§ 53. Rule where Federal question is controlling.**

But the Supreme Court of the United States is not absolutely bound by that rule, for to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion “that the court below may have rested its judgment on a non-Federal ground,” could simply amount to depriving that court of all power to review Federal questions if only a party chose to make such suggestion.<sup>3</sup>

**§ 54. Damages for delay.**

Damages for delay in suing out a frivolous writ of error may be imposed.<sup>4</sup>

**§ 55. Review of findings of fact—general rule, findings of fact are not reviewable.**

On error to a state court the U. S. Supreme Court in cases

<sup>1</sup> Wood v. Chesborough, 228 U. S. 672, 57 L. Ed. 1018; Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., 228 U. S. 596, 57 L. Ed. 982; Southern Pac. R. R. Co. v. Schuyler, 227 U. S. 601, 57 L. Ed. 662; Missouri & K. R. R. Co. v. Olathe, 222 U. S. 187, 56 L. Ed. 156; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 570, 32 Sup. Ct. Rep. 236; Berea College v. Kentucky, 211 U. S. 45; Eustis v. Bolles, 150 U. S. 361, 14 Sup. Ct. Rep. 131, 37 L. Ed. 1111; Adams County v. Burlington, etc., R. Co. 112 U. S. 123, 5 Sup. Ct. Rep. 77, 28 L. Ed. 678.

<sup>2</sup> Preston v. Chicago, 226 U. S. 447, 57 L. Ed. 293; Rutland R. R. Co. v. Central Vermont R. R. Co., 159 U. S. 630, 640, 16 Sup. Ct. Rep. 113, 40 L. Ed. 284.

<sup>3</sup> St. Louis & Iron Mountain Ry. v. McWhirter, 229 U. S. 265, at 276, quoting Neilson v. Lagow, 12 How. 98; Rogers v. Hennepin County, 240 U. S. 184, 36 Sup. Ct. Rep. 265, 60 L. Ed. 594.

<sup>4</sup> Deming v. Carlisle Packing Co., 226 U. S. 102, 33 Sup. Ct. Rep. 102, 57 L. Ed. 140.

at law or in equity cannot reëxamine the evidence, and, when the facts are found below, is concluded by such finding.<sup>1</sup>

### § 56. Exceptions to foregoing rule.

But to this rule there are the following exceptions:

(a) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it.<sup>2</sup>

(b) Where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.<sup>3</sup>

(c) Where the record contains only a general or ultimate conclusion of fact, which is set forth in the decree of the State court, which is so interwoven with the question of law as to be in substance a decision of the latter.<sup>4</sup>

(d) In addition to the above summary, it has been held that the United States Supreme Court will review the facts to ascertain whether in a particular case there was due service upon an

<sup>1</sup> *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 36 Sup. Ct. Rep. 168, 60 L. Ed. 439; *Carlson v. Washington*, 234 U. S. 103; *Egan v. Hart*, 165 U. S. 188, 194, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; *Stanley v. Schwalby*, 162 U. S. 278, 40 L. Ed. 968, 16 Sup. Ct. Rep. 754; *Bartlett v. Lockwood*, 160 U. S. 368, 40 L. Ed. 460, 16 Sup. Ct. Rep. 334; *Dower v. Richards*, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. Rep. 452.

<sup>2</sup> *Jones National Bank v. Yates*, 240 U. S. 541, 36 Sup. Ct. Rep. 429, 60 L. Ed. 788; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 36 Sup. Ct. Rep. 168, 60 L. Ed. 439.

<sup>3</sup> *Northern Pac. R. R. Co. v. North Dakota*, 236 U. S. 585; *Wood v. Chesborough*, 228 U. S. 672, 678, 57 L. Ed. 1018, 1021, 33 Sup. Ct. Rep. 706; *Creswill v. Grand Lodge K. P.* 225 U. S. 246, 261, 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep. 822; *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591, 56 L. Ed. 556, 565, 32 Sup. Ct. Rep. 316.

<sup>4</sup> *Norfolk & W. R. R. Co. v. Conley*, 236 U. S. 605, 59 L. Ed. 745, 35 Sup. Ct. Rep. 437; *Wood v. Chesborough*, 228 U. S. 672, 678, 57 L. Ed. 1018, 1021, 33 Sup. Ct. Rep. 706; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277; *Creswill v. Grand Lodge, K. P.*, 225 U. S. 246, 261, 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep. 822; *Washington ex rel. Oregon R. & Nov. Co. v. Fairchild*, 224 U. S. 510, 528, 56 L. Ed. 863, 869, 32 Sup. Ct. Rep. 535; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 658, 669, 56 L. Ed. 594, 604, 32 Sup. Ct. Rep. 389; *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591, 56 L. Ed. 556, 565, 32 Sup. Ct. Rep. 316.



agent or officer of a corporation, sufficiently representative, to give notice to the corporation, so that it might make its defenses.<sup>1</sup>

The Supreme Court will examine only the record as certified to it and matters outside the record will not be considered.<sup>2</sup>

**§ 57. What are Federal questions—Claims under the Fourteenth Amendment, challenging the Constitutionality of a State Statute.**

The Fourteenth Amendment provides:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

A federal question is presented when the claim was made in the State Court that a state statute as written or as administered and interpreted by the highest Court of the state in some way contravenes the Fourteenth Amendment to the Constitution of the United States or deprived a party of “due process” or “the equal protection of the law.”<sup>3</sup>

<sup>1</sup> *Kelsey v. Tilt*, 207 U. S. 50; *Old Wayne Life Assn. v. McDonough*, 204 U. S. 9, 27 Sup. Ct. Rep. 236, 51 L. Ed. 345; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. Rep. 728, 47 L. Ed. 1113; *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. Rep. 308, 43 L. Ed. 569; *Hovey v. Elliott*, 167 U. S. 445, 17 Sup. Ct. Rep. 841, 42 L. Ed. 215; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. Ed. 464; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. Ed. 222; *Windsor v. McVeigh*, 93 U. S. 277, 23 L. Ed. 914.

<sup>2</sup> *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 36 Sup. Ct. Rep. 626, 60 L. Ed. 1110.

<sup>3</sup> *O'Neil v. Leamer*, 239 U. S. 244, 36 Sup. Ct. Rep. 54, 60 L. Ed. 249; *Londoner v. Denver*, 210 U. S. 386, 28 Sup. Ct. Rep. 373, 52 L. Ed. 1103; *Old Wayne v. McDonough*, 204 U. S. 9, 27 Sup. Ct. Rep. 236, 51 L. Ed. 345; *C. B. & Q. Ry. Co. v. Drainage Comms.*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. Ed. 596; *Cincinnati Packet Co. v. Bay*, 200 U. S. 182, 26 Sup. Ct. Rep. 208, 50 L. Ed. 428; *San José Land & Water Co. v. San José Ranch Co.*, 189 U. S. 177, 23 Sup. Ct. Rep. 487, 47 L. Ed. 765; *Yazoo & Miss. Valley R. R. Co. v. Adams*, 180 U. S. 1, 21 Sup. Ct. Rep. 240, 45 L. Ed. 395; *Amer. Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. Rep. 43, 45 L. Ed. 102; *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 609, 19 Sup. Ct. Rep. 308, 43 L. Ed. 569; *Green Bay v. Patten Paper Co.*, 172 U. S. 68, 19 Sup. Ct. Rep. 97, 43 L. Ed. 364; *C. B. & Q. R. R. Co. v. Chicago*,

A Constitutional question is presented where the claim is made that a State statute as administered and interpreted by the highest Court of the State violates the guarantees of the Federal Constitution, although the statute as written may be free from that objection.<sup>1</sup>

**§ 58. Application and effect.**

The denial of a substantial claim based upon the Constitution of the United States, involving the application and effect of that instrument, presents a Federal question.<sup>2</sup>

**§ 59. Habeas corpus from state court.**

On error to a state court from a decision in habeas corpus proceedings the Supreme Court of the United States will examine the sole question whether the petitioner has been denied a right guaranteed by the Constitution of the United States or laws or treaties of the United States.<sup>3</sup>

**§ 60. "Due process of law," "Equal protection of the law."**

The provisions of the Fourteenth Amendment are universal in their application to all persons within the territorial jurisdiction

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166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047, 38 L. Ed. 1014; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; *Kaukauna Co. v. Green Bay, etc., Canal*, 142 U. S. 269, 12 Sup. Ct. Rep. 173, 35 L. Ed. 1004; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 579, 5 Sup. Ct. Rep. 681, 28 L. Ed. 1084; *Furman v. Nichols*, 75 U. S. 56, 19 L. Ed. 370.

<sup>1</sup> *Myles Salt Co. v. Iberia & St. M. Drainage District*, 239 U. S. 478, 36 Sup. Ct. Rep. 204, 60 L. Ed. 392.

<sup>2</sup> *Miles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 36 Sup. Ct. Rep. 204, 60 L. Ed. 392; *Home Telephone Co. v. Los Angeles*, 227 U. S. 278, 57 L. Ed. 510; *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. Rep. 73, 45 L. Ed. 162; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 52 L. Ed. 78; *Miss. R. Com. v. I. C. R. Co.*, 203 U. S. 335, 27 Sup. Ct. Rep. 90, 51 L. Ed. 209; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. Rep. 585, 46 L. Ed. 808; *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. Ed. 592; *City R. Co. v. Citizens' Street R. Co.*, 184 U. S. 368, 22 Sup. Ct. Rep. 410, 46 L. Ed. 592.

<sup>3</sup> *Yick W. v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220; *Leo Frank v. State*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969.

of the U. S. without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of equal laws.<sup>1</sup>

**§ 61. Class legislation prohibited.**

Class legislation and discrimination are prohibited by the Fourteenth Amendment.<sup>2</sup>

**§ 62. Embraces all agencies of State including the judiciary.**

The prohibitions contained in the Fourteenth Amendment extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities.<sup>3</sup>

The description in the Fourteenth Amendment "any person within its jurisdiction" includes aliens.<sup>4</sup>

**§ 63. Guaranties.**

The Fourteenth Amendment was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."<sup>5</sup>

<sup>1</sup> *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. Rep. 7, 60 L. Ed. 131; *Yick Wo. v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064.

<sup>2</sup> *Yick Wo. v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. Rep. 7, 60 L. Ed. 131.

<sup>3</sup> *Home Telephone & Telegraph Co. vs. City of Los Angeles*, 227 U. S. 278, 33 Sup. Ct. Rep. 278, 57 L. Ed. 510; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 40, 28 Sup. Ct. Rep. 20, 52 L. Ed. 78; *Walker v. L. McLoud*, 204 U. S. 310, 27 Sup. Ct. Rep. 293, 51 L. Ed. 495; *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. Rep. 58, 49 L. Ed. 193; *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979; *Murray v. Louisiana*, 163 U. S. 105, 16 Sup. Ct. Rep. 990, 41 L. Ed. 87; *Gibson v. Mississippi*, 162 U. S. 579, 16 Sup. Ct. Rep. 904, 40 L. Ed. 1075; *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. Rep. 727, 39 L. Ed. 845; *Scott v. McNeal*, 154 U. S. 896, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; *Yick Wo. v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. Rep. 544, 28 L. Ed. 542; *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. Rep. 625, 27 L. Ed. 354; *Wood v. Brush*, 140 U. S. 278, 11 Sup. Ct. Rep. 738, 35 L. Ed. 505; *Neal v. Delaware*, 103 U. S. 370, 397 (26: 567, 574), 26 L. Ed. 567; *Ex parte Virginia* ("Virginia v. Rives") 100 U. S. 313, 318, 319 (25: 667, 669), 25 L. Ed. 667.

<sup>4</sup> *Truax v. Raich*, *supra*, but compare *Crane v. New York*, 239 U. S. 195, 36 Sup. Ct. 85, 60 L. Ed. 218.

<sup>5</sup> *Scott v. McNeal*, 154 U. S. 896, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896.

**§ 64. Includes the State judiciary.**

A State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form.<sup>1</sup>

**§ 65. Where a party had opportunity to be heard.**

But ordinarily where a party brings suit in the State Court, and has a full hearing of his case on its merits, the decision adverse to his claims, even if erroneous, does not deprive him of his property without due process of law.<sup>2</sup>

**§ 66. No due process if without notice.**

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.<sup>3</sup>

**§ 67. A State cannot prevent the object of due process.**

A State cannot make anything due process of law which, by its own legislation, it chooses to declare such.<sup>4</sup>

A mere erroneous construction of State or local law does not deprive a party of due process.<sup>5</sup>

**§ 68. "Due process" applied to judicial proceedings.**

The words "due process of law," when applied to judicial

<sup>1</sup> Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979.

<sup>2</sup> Christianson v. Kings County, 239 U. S. 356, 373, 36 Sup. Ct. Rep. 114, 60 L. Ed. 327; Central Land Co. v. Laidley, 159 U. S. 103-112, 16 Sup. Ct. Rep. 80, 40 L. Ed. 91.

<sup>3</sup> Scott v. McNeal, 154 U. S. 896, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; G. & C. Merriam Co. v. Saalfeld, 241 U. S. 22, 36 Sup. Ct. Rep. 447, 60 L. Ed. 868.

<sup>4</sup> Davidson v. New Orleans, 96 U. S. 97, 102, 26 L. Ed. 616, 619; Chicago B. Q. & R. Co. v. Chicago, 166 U. S. 226, 235, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979.

<sup>5</sup> New Orleans Waterworks Co. v. Louisiana, 185 U. S. 353, 22 Sup. Ct. Rep. 691, 46 L. Ed. 936; Equitable Life Assurance Society v. Brown, 187 U. S. 308; Sawyer v. Piper, 189 U. S. 154, 23 Sup. Ct. Rep. 633, 47 L. Ed. 757; Cosmopolitan Club v. Virginia, 208 U. S. 378, 28 Sup. Ct. Rep. 378, 52 L. Ed. 536.

proceedings mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State, or his voluntary appearance.<sup>1</sup>

### § 69. Notice necessary before judgment.

And the defendant must have notice before judgment. A notice subsequent to the judgment will not give it validity.<sup>2</sup>

Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court.<sup>3</sup>

And such a judgment is wanting in due process of law and wholly void, if a fact essential to the jurisdiction of the court did not exist.<sup>4</sup>

### § 70. Question of due service of process.

On error to the State Court where the allegation is made that the judgment of the State Court amounts to a taking of property without due process of law, “the question for us to decide is, whether upon the facts of this case, the service of process upon the

<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, 572; *Scott v. McNeal*, 154 U. S. 896, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 235, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979. And the process must not be mere idle form. *Dean v. Nelson*, 10 Wall. (U. S.) 171, 19 L. Ed. 926; *Lasere v. Rochereau*, 17 Wall. (U. S.) 437, 21 L. Ed. 694; *Christianson v. Kings County*, 239 U. S. 356, 373, 36 Sup. Ct. Rep. 114, 60 L. Ed. 327.

<sup>2</sup> *Webster v. Reid*, 11 How. (U. S.) 437, 13 L. Ed. 761.

<sup>3</sup> *The Mary*, 13 U. S. 9 Cranch 126, 144, 3 L. Ed. 678, 684; *Hollingsworth v. Barbour*, 29 U. S. 4 Pet. 466, 475, 7 L. Ed. 922, 926; *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. Ed. 565, 570.

<sup>4</sup> *Scott v. McNeal*, 154 U. S. 896, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896.

person named was a sufficient service to give jurisdiction to the court over this corporation."<sup>1</sup>

**§ 71. Supreme Court will decide whether due process denied.**

In reviewing the judgment of the State Court, the U. S. Supreme Court will determine for itself the different questions involved in the determination of the question whether the judgment of the State Court deprived the plaintiff in error of its property without due process of law, as guaranteed by the Fourteenth Amendment.<sup>2</sup>

**§ 72. Service of process on foreign corporation.**

Whether a foreign corporation has been duly served with process and given an opportunity to be heard is a Federal question and is reviewable on a writ of error, provided the reliance on the Fourteenth Amendment to the Constitution of the United States was properly pleaded or brought to the attention of the State Court.<sup>3</sup>

**§ 73. "Due process" synonymous with "the law of the land."**

By the phrase "*by the law of the land*" is meant according to

<sup>1</sup> Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 610, 19 Sup. Ct. Rep. 308, 43 L. Ed. 569, per Mr. Justice Peckham.

<sup>2</sup> Conn. Mutual Life v. Spratley, *Supra*; Huntington v. Attrill, 146 U. S. 657, 664, 13 Sup. Ct. Rep. 224, 36 L. Ed. 1123, and cases cited; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 492, 495, 14 Sup. Ct. Rep. 968, 38 L. Ed. 793, and cases cited; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896.

<sup>3</sup> Washington Virginia Ry. Co. v. Real Estate Trust, 238 U. S. 185, 35 Sup. Ct. Rep. 818, 59 L. Ed. 1262; Interstate Amusement Co. v. Albert, 239 U. S. 560, 36 Sup. Ct. Rep. 168, 60 L. Ed. 439; Tyler Co. v. Ludlow-Sayler Co. 236 U. S. 723, 35 Sup. Ct. Rep. 458, 59 L. Ed. 1493; Int. Harvester Co. v. Ky. 234 U. S. 579, 58 L. Ed. 1479, 34 Sup. Ct. Rep. 944; St. Louis & S. W. Ry. v. Alexander, 227 U. S. 218, 57 L. Ed. 486, 33 Sup. Ct. Rep. 245; Green v. Chicago, B. & Q. R. R. 205 U. S. 530, 27 Sup. Ct. Rep. 595, 51 L. Ed. 916; Old Wayne Life Assn. v. McDonough, 204 U. S. 9, 27 Sup. Ct. Rep. 236, 51 L. Ed. 345; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. Rep. 728, 47 L. Ed., 113; Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. Rep. 308, 43 L. Ed. 569; Hovey v. Elliott, 167 U. S. 445, 17 Sup. Ct. Rep. 841, 42 L. Ed. 215; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773, 35 L. Ed. 464; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. Ed. 222; Windsor v. McVeigh, 93 U. S. 277, 23 L. Ed. 914; Grant v. Cananea, 102 N. Y. S., 642; Iver Wold v. Colt., 102 Minn., 389-91 (citing Federal decisions).

the *course of the common law*, and by the words "*due process of law*," is meant a prosecution of suit according to *the prescribed forms* and solemnities for the purpose of ascertaining guilt, or determining the title to property.<sup>1</sup>

#### § 74. Due process as used in Magna Charta.

The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land," in Magna Charta. Lord Coke in his commentary on those words (2 Inst. 50), says, they mean due process of law.<sup>2</sup>

#### § 75. Substance, not form, governs.

In determining whether a person has been afforded due process of law, regard must be had to substance and not to form.<sup>3</sup>

#### § 76. "Impairing obligations of a contract."

A Federal question sufficiently appears, although the complainant does not mention the Constitution of the United States, where the whole theory of the case is the impairment by statute of a contract created by a prior statute, and the presentation and decision of this question appear from the record and opinion of the State court.<sup>4</sup>

<sup>1</sup> Taylor v. Porter, 4 Hill 140.

<sup>2</sup> Benedict v. People, 149 Ill. 600; Den. v. The Hoboken Land and Improvement Co., 59 U. S. 272, 15 L. Ed. 372.

<sup>3</sup> Raymond v. Chicago Union Traction Co., 207 U. S. 40; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 836, 45 L. Ed. 1165; Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. Rep. 58, 49 L. Ed. 193; Pacific Electric R. R. Co. v. Los Angeles, 194 U. S., 112, 120, 24 Sup. Ct. Rep. 586, 48 L. Ed. 896; Louisville R. Co. v. Schmidt, 177 U. S. 231, 20 Sup. Ct. Rep. 620, 44 L. Ed. 747; Illinois Central R. R. Co. v. Adams, 180 U. S. 31, 21 Sup. Ct. Rep. 251, 45 L. Ed. 410; Howard v. DeCordova, 177 U. S. 613, 20 Sup. Ct. Rep. 817, 44 L. Ed. 908; Huntington v. Laidley, 176 U. S. 668, 20 Sup. Ct. Rep. 526, 44 L. Ed. 630; Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. Rep. 506, 43 L. Ed. 808; Chicago B. Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. Ed. 979; Robb v. Vos., 155 U. S. 13, 45, 15 Sup. Ct. Rep. 4, 39 L. Ed. 52; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. Ed. 896; Simon v. Southern R. Co., 195 Fed. 56.

<sup>4</sup> Jones National Bank v. Yates, 240 U. S. 241, 36 Sup. Ct. Rep. 429, 50 L. Ed. 788; Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673; Grand Trunk Western R. R. Co. v. Lindsey, 223 U. S. 42, 58 L. Ed. 833, 34 Sup. Ct. Rep. 581; Columbia Water Power Co. v. Columbia Electric Street Railway Light & Power Co., 172 U. S. 475, 477, 43 L. Ed. 521, 19 Sup. Ct. Rep. 247.

**§ 77. What is sufficient to show claim under contract clause.**

All that is necessary to establish the jurisdiction of the Supreme Court of the United States is to show that the complainant had, or claimed in good faith to have, a contract with a municipality, which the latter had attempted to impair.<sup>1</sup>

Where the impairment of contract obligations is alleged, the jurisdictional inquiry is directed to the ascertainment whether the State Court has given the subsequent law any validity.<sup>2</sup>

**§ 78. United States Supreme Court not bound by finding of State Court.**

Where it sufficiently appears that the question of impairment of contract obligation was raised in the State Court, and that the highest court of the State gave effect to the subsequent legislation, a case is properly presented for review on a writ of error, and it is the duty of the United States Supreme Court to determine for itself whether a contract existed and whether its obligation has been impaired.<sup>3</sup>

<sup>1</sup> *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 35 Sup. Ct. Rep. 72, 59 L. Ed. 184; *City R. R. Co. v. Citizens' R. Co.* 166 U. S. 562, 17 Sup. Ct. Rep. 653, 41 L. Ed. 1114.

<sup>2</sup> *Moore-Mansfield Const. Co. v. Electrical Installation Co.*, 234 U. S. 619, 58 L. 1503, 34 Sup. Ct. Rep. 941; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 639, 56 L. Ed. 924, 928, 32 Sup. Ct. Rep. 577; *Missouri & K. Interurban R. Co. v. Olathe*, 222 U. S. 187, 190, 56 L. Ed. 146, 158, 32 Sup. Ct. Rep. 47; *Fisher v. New Orleans*, 218 U. S. 438, 440, 54 L. Ed. 1099, 1100, 31 Sup. Ct. Rep. 57; *Columbia Water Power Co. v. Columbia St. Ry.* 172 U. S. 475, 19 Sup. Ct. Rep. 247, 43 L. Ed. 521; *Bacon v. Texas*, 163 U. S. 207, 216, 219, 41 L. Ed. 132, 136, 137, 16 Sup. Ct. Rep. 1023; *Central Land Co. v. Laidley*, 159 U. S. 103, 111, 40 L. Ed. 91, 94, 16 Sup. Ct. Rep. 80; *Wilmington W. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. Rep. 72, 36 L. Ed. 972; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 38, 39, 31 L. Ed. 607, 614, 615, 8 Sup. Ct. Rep. 741; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392, 30 L. Ed. 1059, 1060, 7 Sup. Ct. Rep. 916; *Knox v. Exchange Bank*, 12 Wall. 379, 383, 20 L. Ed. 414, 415.

<sup>3</sup> *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 36 Sup. Ct. Rep. 168, 60 L. Ed. 439; *New York Elec. Lines v. Subway Co.*, 235 U. S. 562, 35 Sup. Ct. Rep. 72, 59 L. Ed. 184; *Louisiana R. & Nav. Co. v. Behrman*, 235 U. S. 164, 35 Sup. Ct. Rep. 62, 59 L. Ed. 175; *Russell v. Sebastian*, 233 U. S. 195, 58 L. Ed. 912; *Atlantic Coast Line Co. v. Goldsboro*, 232 U. S. 548, 556, 58 L. Ed. 721, 725, 34 Sup. Ct. Rep. 364; *Grand Trunk Western R. R. Co. v. South Bend*, 227 U. S. 544, 57 L. Ed. 633, 33 Sup.



### § 79. Ordinances.

(a) Although an ordinance takes the form of a contract and provides for its acceptance by the grantee of the privilege given thereby, it cannot be treated as a mere contract, and as such has the force of law within the limits of the municipality.<sup>1</sup>

(b) If the impairment of prior contract rights was caused by the acceptance of a latter ordinance by a public service corporation, then such impairment was caused by the acceptance of the ordinance and not by the passage of same. In such a case no Federal question arises.<sup>2</sup>

(c) If an ordinance is merely void under the laws of the State, no Federal question is presented.<sup>3</sup>

### § 80. Charters held inviolable.

"A charter of incorporation granted by a State creates a contract between the State and the corporation which the State cannot violate."<sup>4</sup>

This has been held so often by this Court that it is a "work of supererogation" to repeat it.<sup>5</sup>

Ct. Rep. 303; Northern Pac. R. R. Co. v. Minnesota, 208 U. S. 583; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. Ed. 788, 791, 21 Sup. Ct. Rep. 575; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. Ed. 553, 557, 18 Sup. Ct. Rep. 199.

<sup>1</sup> New York Electric Lines v. Subway Co., 235 U. S. 562, 35 Sup. Ct. Rep. 72, 59 L. Ed. 184; City R. Co. v. Citizens' St. R. R. Co., 166 U. S. 562, 17 Sup. Ct. Rep. 653, 412 L. Ed. 1114; New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U. S. 18, 8 Sup. Ct. Rep. 741, 31 L. Ed. 607; Hayes v. Mich. Cent. R. R. Co., 111 U. S. 228, 237, 240, 4 Sup. Ct. Rep. 369, 28 L. Ed. 410; Iron Mountain R. Co. v. Memphis (C. C. A. 6th Cir.), 96 Fed. 113, 37 C. C. A. 410; Mason v. Shawneetown, 77 Ill. 533; City v. Topeka Ry. Co., 51 Kan. 609; Dillon on Municipal Corp. 4th Ed. Vol. 1, Sec. 308.

<sup>2</sup> Henderson Bridge Co. v. Henderson City, 141 U. S. 679, 12 Sup. Ct. Rep. 114, 35 L. Ed. 900; 173 U. S. 592, 19 Sup. Ct. Rep. 553, 43 L. Ed. 823.

<sup>3</sup> Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258-266, 13 Sup. Ct. Rep. 90, 36 L. Ed. 963; Barney v. New York, 193 U. S. 430, 24 Sup. Ct. Rep. 502, 48 L. Ed. 737.

<sup>4</sup> Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629.

<sup>5</sup> Wilmington R. R. v. Reid, 13 Wall. 264, 20 L. Ed. 568; Gibbons v. Mahon, 136 U. S. 557, 34 L. Ed. 527, 10 Sup. Ct. Rep. 1057; New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 660, 29 L. Ed. 520, 6 Sup. Ct. Rep. 252.

It "has been the settled law of this court since the decision in the Dartmouth College case."<sup>1</sup>

**§ 81. Claims under Federal statutes.**

A party who unsuccessfully relies in the State Court upon an Act of Congress either as a cause of action or defense is entitled to bring the case up for review to the United States Supreme Court.<sup>2</sup>

**§ 82. "Full faith and credit"—Constitutional provisions.**

Article I, § 1, of the Constitution of the United States of America provides that full faith and credit shall be given in each State to the *public acts, records, and judicial proceedings of every State*. Accordingly, the Supreme Court of the United States will review a case from the highest court of a State where the Federal question based upon said constitutional provision was fairly presented.<sup>3</sup>

**§ 83. Failure to give effect to Federal judgment.**

A writ of error or certiorari will also lie where the highest court of a State refuses to give effect to a judgment rendered by a Federal Court.<sup>4</sup>

<sup>1</sup> Delaware R. R. Tax, 18 Wall. 206, 21 L. Ed. 888.

<sup>2</sup> Monages v. Alvarez, 235 U. S. 81, 35 Sup. Ct. Rep. 95, 59 L. Ed. 139; S. R. R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. Rep. 897; St. Louis, I. & M. & S. R. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. Rep. 616; Nutt v. Knut, 200 U. S. 12, 50 L. Ed. 348, 26 Sup. Ct. Rep. 216; Ill. Cent. R. R. Co. v. McKendree, 203 U. S. 514, 525, 27 Sup. Ct. Rep. 153, 51 L. Ed. 298; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687, 44 L. Ed. 839; Furman v. Nichol, 8 Wall. 44, 19 L. Ed. 370.

<sup>3</sup> Atchison, Topeka & Santa Fé Ry. Co. v. Sowers, 213 U. S. 55; Am. Ex. Co. v. Mullin, 212 U. S. 311; Brown v. Fletcher Estate, 210 U. S. 88; Fauntleroy v. Lum, 210 U. S. 43; St. Louis & Iron Mt. Ry. Co. v. Taylor, 210 U. S. 281; Tilt v. Kelsey, 207 U. S. 43; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. Rep. 625, 49 L. Ed. 1023; Hancock Natl. Bank v. Farnham, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44 L. Ed. 619; Great Western Tele. Co. v. Purdy, 162 U. S. 329; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. Ed. 1123; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. Rep. 960, 35 L. Ed. 640; Dupasseur v. Rochereau, 21 Wall. 130, 134, 22 L. Ed. 588; Crapo v. Kelly, 16 Wall. 610, 212 Ed. 430.

<sup>4</sup> Werlein v. New Orleans, 177 U. S. 396, 20 Sup. Ct. Rep. 682, 44 L. Ed. 817; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. Rep. 611, 38 L. Ed. 327; Giles v. Little, 134 U. S. 649, 10 Sup. Ct. Rep. 623, 33 L. Ed. 1062; Crescent City L. S. L. H. Co. v. Butchers' Union, 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30 L. Ed. 641.

But it has also been held that the failure of a State Court to give effect to a judgment of a Federal Court rendered subsequent to a judgment rendered by a State Court does not raise a Federal question, but involves merely a question of *res adjudicata*.<sup>1</sup>

#### § 84. Force to be given to a Federal judgment.

No higher sanctity or effect can be claimed for a judgment of a Federal Court than is due under the same circumstances to judgments of State courts in like cases.<sup>2</sup>

#### § 85. Judgments of the same jurisdiction.

If a State Court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by the Supreme Court of the United States.<sup>3</sup>

Where a judgment was pleaded with the statement that a denial to give it full faith and credit would be violating the Federal Constitution, this sufficiently raises a Federal question reviewable in the U. S. Supreme Court.<sup>4</sup>

#### § 86. Navigable waters of the United States.

Decisions of the highest court of the State affecting commerce and navigable waters of the United States are reviewable in the United States Supreme Court.<sup>5</sup>

<sup>1</sup> Northern Pacific R. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. Rep. 740, 36 L. Ed. 506.

<sup>2</sup> Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174, 16 Sup. Ct. Rep. 471, 40 L. Ed. 660; Dupasseur v. Rochereau, 88 U. S. 130, 21 Wall. 130, 22 L. Ed. 588; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. Rep. 25, 27 L. Ed. 346.

<sup>3</sup> Phoenix Fire Ins. Co. v. Tennessee, 161 U. S. 474, 16 Sup. Ct. Rep. 471, 40 L. Ed. 660; Newport Light Co. v. Newport, 151 U. S. 527, 14 Sup. Ct. Rep. 429, 38 L. Ed. 259.

<sup>4</sup> Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. Rep. 724, 59 L. Ed. 1089.

<sup>5</sup> Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. Rep. 671, 60 L. Ed. 1041; Schoomaker v. Gilmore, 102 U. S. 118, 26 Ed. 95, Adams Exp. Co. v. Iowa, 196 U. S. 147, 25 Sup. Ct. Rep. 185, 49 L. Ed. 424; Walsh v. Columbia R. R. Co., 176 U. S. 469, 20 Sup. Ct. Rep. 393, 44 L. Ed. 548; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. Rep. 264, 37 L. Ed. 1218. For definition of term, "Navigable Waters of the U. S." see The Montello, 11 Wall. 411, 20 L. Ed. 191; The Montello, 20 Wall. 430, 22 L. Ed. 391.

**§ 87. Federal and State legislation.**

The River and Harbor Act of 1890 and the laws of the several States relating to navigable waters of the United States have a direct relationship to each other, the interpretation of which presents a Federal question.<sup>1</sup>

**§ 88. Federal land titles.**

Where plaintiff in error claims title under a grant from the United States, a Federal question is presented reviewable by the United States Supreme Court.<sup>2</sup>

(a) But where the decision of the State Court does not deny the validity of the Federal title, but dismisses the action on the ground of estoppel such as laches or acquiescence, a Federal question is not presented.<sup>3</sup>

(b) The same rule applies where the decision of the State Court recognizes the Federal title, but merely decides to whom the confirmation of title was made.<sup>4</sup>

(c) Nor does the question of a mere boundary present a Federal question reviewable by writ of error.<sup>5</sup>

(d) Where both sides claim title under a common grantor whose title from the United States is admitted, a Federal question is not presented.<sup>6</sup>

**§ 89. Questions under the banking laws of the United States.**

In order to claim rights under the banking laws of the United

<sup>1</sup> U. S. v. Bellingham Bay Boom Co., 176 U. S. 211, 20 Sup. Ct. Rep. 343, 44 L. Ed. 437.

<sup>2</sup> French Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54, 22 Sup. Ct. Rep. 563, 46 L. Ed. 800; Northern Pacific v. Colburn, 164 U. S. 383, 17 Sup. Ct. Rep. 98, 41 L. Ed. 479; Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. Rep. 754, 40 L. Ed. 960; Shively v. Bowlby, 152 U. S. 335, 14 Sup. Ct. Rep. 548, 38 L. Ed. 335; Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 307.

<sup>3</sup> State of Michigan v. Flint & Pere Marquette R. R. Co., 152 U. S. 363, 14 Sup. Ct. Rep. 386, 38 L. Ed. 479.

<sup>4</sup> Carpenter v. Williams, 9 Wall. 785, 19 L. Ed. 827.

<sup>5</sup> Sweringen v. St. Louis, 185 U. S. 38, 22 Sup. Ct. Rep. 569, 46 L. Ed. 795.

<sup>6</sup> State of California, ex rel. Hastings, v. Hastings and Jackson, 112 U. S. 233, 5 Sup. Ct. Rep. 113, 28 L. Ed. 713.

States such rights or privileges must arise only from and by virtue of said laws and not otherwise.<sup>1</sup>

But where the power of a national bank to make a certain contract is involved, a Federal question is thereby preserved.<sup>2</sup>

A holding by a State Court that certain funds were never a part of the assets of a National Bank does not raise a Federal question.<sup>3</sup>

Nor that a claim against a National Bank was a valid obligation.<sup>4</sup>

**§ 90. Questions under patent laws, when validity not involved, no Federal question.**

Where the validity of the patent itself is not involved and the decision of the State Court turns upon a question of fraud, a Federal question is not in the case.<sup>5</sup>

**§ 91. Mining claims as a Federal question.**

Where a person complies with the mining laws of the United States and claims title by virtue thereof, he thereby tenders a Federal question.<sup>6</sup>

**§ 92. Questions of res adjudicata, not Federal.**

But where the question turns upon the effect of a former adjudication and does not involve the validity of the claim itself under the laws of the United States, a Federal question does not arise.<sup>7</sup>

<sup>1</sup> Seeberger v. McCormick, 175 U. S. 274, 281, 20 Sup. Ct. Rep. 128, 44 L. Ed. 161; National Bank v. Louisville, New Albany & Chi. Ry. Co., 163 U. S. 325, 16 Sup. Ct. Rep. 1039, 41 L. Ed. 177; Le Sassier v. Kennedy, 123 U. S. 521, 8 Sup. Ct. Rep. 244, 31 L. Ed. 262.

<sup>2</sup> California Natl. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. Rep. 831, 42 L. Ed. 199; McCormick v. National Bank, 165 U. S. 538, 17 Sup. Ct. Rep. 433, 41 L. Ed. 817.

<sup>3</sup> Capitol National Bank v. First National Bank, 172 U. S. 425, 19 Sup. Ct. Rep. 202, 43 L. Ed. 502.

<sup>4</sup> Chemical National Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. Rep. 439, 40 L. Ed. 595.

<sup>5</sup> Wade v. Lawder, 165 U. S. 623, 17 Sup. Ct. Rep. 425, 41 L. Ed. 855.

<sup>6</sup> Blackburn v. Portland Mining Co., 175 U. S. 571, 20 Sup. Ct. Rep. 222, 44 L. Ed. 277; Lavagino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. Rep. 716, 49 L. Ed. 1119.

<sup>7</sup> Smalley v. Laugenour, 196 U. S. 93, 25 Sup. Ct. Rep. 216, 49 L. Ed. 401.

**§ 93. Claim under the bankruptcy laws of the United States.**

A person who was not a party to the bankruptcy proceedings cannot claim the benefit of the bankruptcy laws, and therefore the reliance by him upon the bankruptcy laws is so devoid of merit as to warrant the dismissal of the writ of error for want of jurisdiction.<sup>1</sup>

A purchaser of property in a bankruptcy proceeding has sufficient standing to have the decision of the State Court relating to the title to the property so purchased by him reviewed.<sup>2</sup>

And a review by writ of error may be had of a dispute involving the validity of a transfer by a trustee in bankruptcy.<sup>3</sup>

**§ 94. No writ in forma pauperis.**

A writ of error to a State Court cannot be allowed in *forma pauperis*. Bond must be furnished.<sup>4</sup>

<sup>1</sup> Factors & Traders Ins. Co. v. Mary Murphy, 111 U. S. 738, 4 Sup. Ct. Rep. 679, 28 L. Ed. 583.

<sup>2</sup> New Orleans v. Delamore, 114 U. S. 501, 5 Sup. Ct. Rep. 1009, 29 L. Ed. 244.

<sup>3</sup> Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. Rep. 155, 29 L. Ed. 467.

<sup>4</sup> Galloway v. State National Bank, 186 U. S. 177, 22 Sup. Ct. Rep. 811, 46 L. Ed. 1111. For form of bond see appendix.

## CHAPTER X

**Appeals from Court of Claims—Jurisdiction of U. S. Supreme Court**

SEC.

1. A statutory appeal, § 181 of Federal Judicial Code.
2. Jurisdictional amount—three thousand dollars.  
Not required when U. S. is appellant.
3. Time to appeal.
4. Fraudulent claim forfeited.
5. Right to appeal.
6. Who may not claim or prosecute.

SEC.

7. Written application for appeal necessary—Order allowing appeal.
8. Contents of record on appeal.
9. Time limit ends at application to allow appeal.
10. Findings of fact and conclusions of law to be made.
11. Parties to submit findings.
12. Applied to District of Columbia Claims Act.

**§ 1. A statutory appeal, § 181 of Federal Judicial Code.**

“The plaintiff or the United States, in any suit brought under the provisions of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner herein prescribed.”

Sect. 181 of Judicial Code.

**§ 2. Jurisdictional amount—three thousand dollars.**

The statutes referred to in the above section are as follows:

“Sect. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States from all judgments adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said Court, as provided in Section 172.”

The jurisdictional amount is not required where the U. S. is the appellant.<sup>1</sup>

<sup>1</sup> United States v. Davis, 131 U. S. 36, 9 Sup. Ct. Rep. 657, 33 L. Ed. 93.

**§ 3. Time to appeal.**

Section 243 is as follows:

"All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered and shall be allowed under such regulations as the Supreme Court may direct."

The foregoing has been rendered of no effect by the provisions of § 1228a (Act of September 6, 1916, C. 448, § 6) which fixes time for all appeals to Supreme Court at three months.

**§ 4. Fraudulent claim forfeited.**

"Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, *ipso facto*, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same."

§ 172 Federal Judicial Code.

**§ 5. Right to appeal.**

"In any case brought in the Court of Claims under any Act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or against any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed."

§ 182 Federal Judicial Code.

**§ 6. Who may not claim or prosecute.**

"No person shall file or prosecute in the Court of Claims or in the Supreme Court an appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

§ 154 Federal Judicial Code.



## § 7. Written application for appeal necessary—Order allowing appeal.

"Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing and signed by the claimant or his attorney of record if the appeal be on his behalf; or, if taken by the United States, it must be signed by the Attorney-General or the proper Assistant Attorney-General.

"Such application if made when the court is not in sessions must be filed with the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket."<sup>1</sup> (Rule 96 of the Court of Claims.)

"No order will be entered by the clerk unless it be directed from the bench or be reduced to writing and marked 'Allowed' by the chief justice or one of the judges. (Rule 98 of the Court of Claims.)

"The clerk will not file any paper unless it be properly indorsed, showing the nature of same, with the title and number of the suit and the name of the attorney filing it." (Rule 99 of the Court of Claims.)

## § 8. Contents of record on appeal.

Cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, shall be heard in the Supreme Court upon the following record, and none other:<sup>2</sup>

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case."<sup>3</sup>

"2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court finds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record." Rule 15.<sup>4</sup>

<sup>1</sup> U. S. v. Adams, 6 Wallace 101, 82 L. Ed. 792; Ex parte Russell, 13 Wall. 664, 672, 20 L. Ed. 632.

<sup>2</sup> The Supervisors v. Durant, 9 Wall. 419, 19 L. Ed. 733, and 7 C. Cls. R. 508, and Union Pacific R. R. Co. v. U. S., 116 U. S. R. 154, 402, 6 Sup. Ct. Rep. 325 29 L. Ed. 584; also opinion of Court of Claims under § 2 Rule 8 of U. S. Sup. Ct.

<sup>3</sup> Union Pacific Ry. Co. v. United States, 116 U. S. 402, 6 Sup. Ct. Rep. 631, 29 L. Ed. 677; Burr v. Des Moines N. & R. Co., 1 Wall. 99, 102, 17 L. Ed. 561.

<sup>4</sup> Beach v. U. S., 226 U. S. 243, 33 Sup. Ct. Rep. 20, 57 L. Ed. 205 (17 Wall. xvii.); DeGroot v. The United States, 5 Wall. 419, 18 L. Ed. 700, and 7 C. Cls. R. 2; Desmare v. The United States, 93 U. S. R. 605, 23 L. Ed. 959, and 12 C. Cls. R. 33; 18 C. Cls. R. 289, 705; Carver v. The United States, 111 U. S. R. 609, 28 L. Ed. 540, 4 Sup. Ct. Rep. 561; United States v. Adams, 6 Wall. 101, 18 L. Ed. 792, and 7 C. Cls. R. 11; U. P. R. R. Co. v. United States, 116 U. S. 154, 29 L. Ed. 584, 6 Sup. Ct. Rep. 325, 20 C. Cls. R. 508, 109, 26 C. Cls. R. 109.

Rule 8, Section 5, and Rule 9, Section 1, require that the record on appeal in cases from all courts must be filed with the clerk of the Supreme Court and the case docketed within thirty days from the allowance of the appeal.

Rule 20, Section 1, permits submission of appeals from the Court of Claims on printed briefs without oral argument, by consent of both parties, within the first ninety days of the term, and thereafter within thirty days after docketing, but not later than April 1. Twenty-five copies of the arguments, signed by attorneys or counselors of the Supreme Court, must first be filed.

### § 9. Time limit ends at application to allow appeal.

"In all cases an order of allowance of appeal by the Court of Claims, or the Chief Justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal." Rule 3.<sup>2</sup>

### § 10. Findings of fact and conclusions of law to be made.

"In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case."<sup>2</sup> (Rule 4.)

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<sup>2</sup> United States v. Henry, 17 Wall. 405, 21 L. Ed. 673, 9 C. Cls. R. 22, and 23 C. Cls. R. 1, 41.

<sup>2</sup> "The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the proposition of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."

Burr v. Des Moines Rail. & Nav. Co., 1 Wall. 101, 17 L. Ed. 562; Beach v. U. S., 226 U. S. 243, 33 Sup. Ct. Rep. 20, 57 L. Ed. 205.

**§ 11. Parties to submit findings.**

“In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.” (Rule 5.)

**§ 12. Applied to District of Columbia Claims Act.**

“Ordered, that Rule I, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 10, 1880, C. 243, ‘to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes.’” (Adopted May 7, 1883. Rule 6).

## CHAPTER XI

## The Court of Customs Appeals

- | SEC.  | SEC.                            |
|---|---------------------------------|
| 1. THE STATUTE creating the Court, § 188 Federal Judicial Code. | 14. Attorneys.                  |
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### § 1. THE STATUTE creating the Court, § 188 Federal Judicial Code.

“There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedent according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decisions thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court the President may, upon the request of the presiding judge of said court, designate any qualified United States or circuit district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.” (Chapter 8, § 188 Federal Judicial Code.)

## § 2. Court never closes.

"The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which court shall be held, his actual and necessary expenses of one stenographic clerk who may accompany him; and such payments shall be allowed the marshal in the settlement of his accounts with the United States." (§ 189 Federal Judicial Code.)

## § 3. Executive officer of Court.

"Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be marshals of said court. The marshal for said court of the District of Columbia is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge." (§ 190 Federal Judicial Code.)

## § 4. Clerk of Court—powers and duties.

"The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which sum shall be in full payment for all services rendered by such clerk; and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in said court to be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: Provided, that the costs and fees so fixed shall not, with

respect to any item, exceed the costs and fees charged in the Supreme Court of the United States: and the same shall be expended, accounted for, and paid over to the Treasury of the United States." (§ 191 Federal Judicial Code.)

### § 5. Assistant clerks, etc.

"In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct." (§ 192 Federal Judicial Code.)

### § 6. Place for holding Court.

"The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney-General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: Provided, That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the Attorney-General, may from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such cannot, by reason of actual occupancy or use, be occupied or used by said court of Customs Appeals. (§ 193 Federal Judicial Code.)

### § 7. Powers of the Court.

"The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to

the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly." (§ 194 Federal Judicial Code.)

### § 8. Jurisdiction of Court of Customs Appeals.

"The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases." (§ 195 Federal Judicial Code.)

### § 9. Transfer of review from other courts.

"After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be allowed or exercised by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: Provided, That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine: Provided, That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of errors, and all such cases theretofore submitted for decision in said courts remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed." (§ 196 Federal Judicial Code.)

**§ 10. Cases pending transferred.**

"Immediately upon the organization of the Court of Customs Appeals, all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial, or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: Provided, That where orders for the taking of further testimony before referee have been made in any of such cases, the taking of such testimony shall be completed before such certification." (§ 197 Federal Judicial Code.)

**§ 11. Time for appeal. Record.**

"If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: Provided, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Custom Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination." (§ 198 Federal Judicial Code.)

**§ 12. No delay in hearing. Call of calendar.**

"Immediately upon the receipt of any record transmitted to said court for determination, the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereon submitted, except for good cause shown, at least once every sixty days: Provided, that such calendar need not be called during the months of July and August of any year." (§ 199 Federal Judicial Code.)



### § 13. THE RULES OF THE COURT. The Clerk.

"RULE 1. The clerk of this court shall keep his office in the city of Washington. He shall not practice either as an attorney or counselor of this court while he shall continue to be clerk. He shall indorse on every paper the date on which the same is filed and shall not permit any original paper, document, or exhibit to be taken from the court room or from the office without an order from the court or permission of one of the judges thereof. But the parties interested in any matter pending before the court may have full access to the records in such matters in the office of the clerk and may take copies of all papers filed therein."

### § 14. Attorneys.

"RULE 2. Parties shall be entitled to be represented in this court by attorney. Any attorney who is entitled to practice in the Supreme Court of the United States or in the circuit courts of appeals or circuit courts of the United States or in the court of last resort in any State or Territory may be admitted to practice in and have his name enrolled as an attorney of this court by the clerk upon filing a recommendation of any justice of the Supreme Court of the United States, United States circuit or district judge, or a judge of the court of last resort of the State or Territory in which such attorney may reside at the time of his application for admission to this court, or upon motion by an attorney of this court. Prior to the issuance of the certificate of admission the attorney shall take and subscribe the following oath of office, which shall be filed with the clerk:

"I, \_\_\_\_\_, do solemnly swear [or affirm] that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the Constitution of the United States.' "

### § 15. Process.

"RULE 3. Processes to be issued from this court shall be of such form and style as is in use in the Supreme Court of the United States. There shall also be a process to be issued to the Board of General Appraisers, which shall be called a mandate, and shall in terms direct the transmission to this court in proper cases of proceedings taken and had before said Board of General Appraisers. All writs shall be attested in the name of the presiding judge, shall be signed by the clerk of the court, with the seal of the court attached, and shall be made returnable 30 days from the date thereof; provided that the time fixed for the return of such record may be extended, upon application to the court, or a judge thereof, at chambers, and upon good cause shown, or the time may be extended by stipulation, which shall be made expressly subject to the future orders of the court."

**§ 16. Review.**

"RULE 4. Any party feeling aggrieved at any decision of the Board of General Appraisers and who may be entitled, under the provisions of Chapter 8 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, or any amendment thereof, to have a review of said decision, may, within the time fixed by said act or any amendment thereof, apply to this court for a review of the questions of law and fact included therein."

**§ 17. Assignment of errors.**

"RULE 5. The party seeking a review of any appealable decision of the Board of General Appraisers shall file with the clerk, in duplicate, a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector or on the importer, owner, consignee, agent, or attorney, as the case may be, either by mail or by delivering the same personally to the party to be served or to his attorney, who shall have regularly appeared before said Board of General Appraisers on or before the date of such application. Such service, in case of mailing, shall be by depositing in a post office a copy of such statement in a sealed envelope plainly addressed to the party or attorney to be served at his place of business or residence, with postage thereon fully prepaid. In all cases where the United States is not the appellant such application for review shall be accompanied by the filing fee of \$6 and by a bond for costs in a sum not less than \$25."

**§ 18. Mandate.**

"RULE 6. Upon the filing of such application for review, a mandate shall issue to said Board of General Appraisers directing said board to transmit to said court the records and evidence taken by them, together with a certified statement of the facts involved in the case and the decision thereon, together with all samples and exhibits used before them."

**§ 19. Calendar.**

"RULE 7. All cases transmitted to this court, whether removed from the Board of General Appraisers in response to the mandate of this court or by the transfer from the United States circuit courts of appeals, United States circuit, territorial, or district courts, shall, upon receipt of the record by the clerk, be placed upon the calendar in the order in which they are received, and such cases shall stand for hearing and submission in that order without notice; provided, the hearing of any case may be postponed for good cause shown. On motion of either party, with due notice to the other side, the court may advance on the calendar cases that are of unusual importance, or whenever other considerations of public policy make such action appear desirable."

## § 20. Records and briefs.

"RULE 8. The appellant shall, within 14 days from the filing of such return, or within such further time as may be allowed by the court or a judge thereof at chambers, deposit with the clerk a sum sufficient to meet the cost of printing the record. As soon as the record is printed the clerk shall retain at least 15 copies for the use of the court and furnish not less than 10 copies to the appellant, who shall serve not less than three copies on the appellee or his counsel.

"Within fourteen days after the receipt of the printed record, appellant shall serve on the appellee or his counsel not less than three copies of his brief, and within fourteen days thereafter the appellee shall serve not less than three printed copies of his brief with the appellant or his counsel. Both sides shall promptly file not less than 15 copies of their briefs with the clerk. Extension of the time for filing briefs for a period not exceeding thirty days may be made by stipulation, which shall become effective when filed with the clerk.

"All records and briefs for the use of this court shall have a suitable cover containing the title of the court and cause. Records shall be properly indexed and printed under the direction of the clerk of the court. The size of the pages of the records and briefs shall be  $9\frac{1}{4}$  inches by  $6\frac{1}{8}$  inches."

## § 21. Sessions.

"RULE 9. The court will convene during sessions at 10 A.M., and will continue its sessions until all cases on its calendar in readiness for hearing are disposed of. All motions shall be presented at the opening of court on Tuesdays, but when the court is in session for hearing causes they may be presented at the opening of court on any day of the session."

## § 22. Appeals, when taken.

"RULE 10. The court shall be open for business on each business day of the year for the purpose of receiving applications for appeal, and on such days writs directed to the Board of General Appraisers may issue as of course, attested in the name of the presiding judge and signed by the clerk or assistant clerk. In case of a vacancy in the office of the presiding judge, they may be attested in the name of the next judge in the order of precedence as acting presiding judge."

## § 23. Amendments—Judgments.

"RULE 11. The court may, in furtherance of justice, permit amendments to processes or proceedings in any case, and on final hearing may affirm, reverse, or modify any ruling, decision, or conclusion of the Board of General Appraisers, or may reverse and remand for new trial or other appropriate proceeding."

### § 24. Final decision—Mandate.

“RULE 12. At the expiration of thirty days after decision by the court, the court shall issue its mandate to the Board of General Appraisers for such further proceedings as shall be proper to be taken in pursuance of such determination.”

### § 25. Fees of clerk and marshal.

“RULE 13. The fees of the clerk of the court shall be \$6 in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for final determination. There shall be paid for each certificate of admission of an attorney to practice, \$1; and for making or copying any record or other paper and certifying the same, 15 cents per folio of 100 words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance.

“The fees and costs to be allowed the marshal shall be, and hereby are, fixed the same as those allowed the marshal of the Supreme Court of the United States.”

### § 26. Arguments.

“RULE 14. Arguments shall be limited to one hour on a side, and not more than two counsel on a side shall be heard in any case except by special order of the court. The time for oral argument may be extended in the discretion of the court.”

### § 27. Appearances.

“RULE 15. It will not be necessary for the Assistant Attorney-General in charge of customs cases to file a notice of appearance in this court or to serve such notice on opposing attorneys. Where the appellant is a protestant, if the petition for review is filed by a member of the bar of this court, no separate appearance as attorney will be required, but a notice of appearance shall be served on the Assistant Attorney-General unless such appellant's attorney represented the importer before the Board of General Appraisers. Where the United States is the appellant the attorneys for the appellee shall file a notice of appearance in this court and serve a copy of such notice on the Assistant Attorney-General.”

**§ 28. Applications for rehearing.**

"RULE 16. No application for rehearing will be considered by the court unless the moving party, at as early a date as may be practicable and within 30 days after decision unless further time be granted, shall cause any papers upon which it is based, together with his reasons for granting the same, to be printed and 12 copies thereof filed with the clerk of this court, together with proof that a copy thereof has been served upon counsel for the opposing party. The opposing party may at any time within 10 days thereafter file with the clerk of the court his objections to the granting of the application, serve a copy thereof upon the moving party, and the question shall thereupon be deemed submitted for decision."

## CHAPTER XII

## Appeal and Error from Various Territorial Courts

- | Sec.  | Sec.   |
|---|--|
| 1. From Court of Appeals of District of Columbia. Limit of jurisdiction.        | 6. Time for appeal and error—Porto Rico.   |
| 2. Appeals and writs of error from District Courts of Porto Rico and Hawaii.    | 7. From the Supreme Court of Philippine Islands. Procedure limited to certiorari.        |
| 3. Jurisdiction of the U. S. Circuit Court of Appeals.                          | 8. Special provisions as to courts of Alaska.  |
| 4. Appeals and writs of error direct to Supreme Court.                          | 9. Appeals and writs of error from District Court of Alaska direct to the Supreme Court. |
| 5. Appeals and writs of error from Supreme Court of Porto Rico and Hawaii—Time. |  |

**§ 1. From Court of Appeals of District of Columbia. Limit of jurisdiction of U. S. Supreme Court.**

Sec. 250 of the Federal Judicial Code provides:

“Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed and reversed or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

“*First.* In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

“*Second.* In prize cases.

“*Third.* In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority.

“*Fourth.* In cases in which the constitution or any law of a state is claimed to be in contravention to the Constitution of the United States.

“*Fifth.* In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

“*Sixth.* In cases in which the construction of any law of the United States is drawn in question by the defendant.

“Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, copyright laws, revenue laws, the criminal laws, and in admiralty cases; and,

except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

"Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit court of appeals to the Supreme Court of the United States."<sup>2</sup>

## § 2. Appeals and Writs of Error from District Courts of Porto Rico and Hawaii.

Appeals and writs of error from the final decisions of the District Courts of Porto Rico and Hawaii in all cases other than those in which appeals and writs of error may be taken direct to the United States Supreme Court must be taken to the following United States Circuit Courts of Appeals:

<sup>1</sup>36 Stat. L. 1159.

In the recent case of *McGowan v. Parish*, 237 U. S. 285, 289, 290, 35 Sup. Ct. Rep. 543, 59 L. Ed. 955, 961, the Court construed the above section 250 as follows:

"Section 250 allows a review by this court of the final judgments or decrees of the Court of Appeals of the District of Columbia upon writ of error or appeal in six classes of cases. The first is: 'Cases in which the jurisdiction of the trial court is in issue; but when any such cases not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.' In the remaining five classes of cases the section imposes no similar restriction upon the scope of the review. In this respect, the section is analogous to sec. 238 (36 Stat. L. 1157, Chap. 231, Comp. Stat. 1913, Sec. 1215), which regulates direct appeals and writs of error from the district courts of the United States. Under that section it is held that, in cases other than those that raise alone the question of the jurisdiction of the district court, the appellate review by this court is general. *Siler v. L. & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57, 63 L. Ed. 417, 419, 33 Sup. Ct. Rep. 192; *Ann. Cas.* 1914, C. 176; *Singer Mach. Co. v. Brickell*, 233 U. S. 204, 312, 316, 58 L. Ed. 974, 978, 979, 34 Sup. Ct. Rep. 493. The same rule obtains in cases coming here from a district court under section 286, Judicial Code, where the jurisdiction of that court is invoked upon constitutional grounds and a direct appeal is allowed. *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. Ed. 738, 743, 34 Sup. Ct. Rep. 372; *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 604, ante 379, 382, 35 Sup. Ct. Rep. 146. A similar rule must be applied to appeals and writs of error taken under section 250, and in the present case our jurisdiction, properly invoked upon a substantial ground specified in the section, other than a question of jurisdiction covered by its first clause, extends to the determination of all questions presented by the record, irrespective of the disposition that may be made of the question respecting Rev. Stat. §3477, or whether it is found necessary to decide that question at all."

(a) From the District Courts of Porto Rico to the United States Circuit Court of Appeals for the 1st Circuit.<sup>1</sup>

(b) From the District Courts of Hawaii to the United States Circuit Court of Appeals for the 9th Circuit.<sup>2</sup>

### § 3. Jurisdiction of the U. S. Circuit Court of Appeals.

By the Act of January 28, 1915, amending sections one hundred and twenty-eight, two hundred and thirty-eight, and two hundred and forty-six of the Federal Judicial Code, Act of March 3, 1911, it is provided as follows:

"SEC. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite party to the suit or controversy being aliens and citizens of the United States or citizens of different states; also, in all cases arising under the patent laws, under the trademark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."<sup>3</sup>

### § 4. Appeals and writs of error direct to Supreme Court.

"SEC. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."<sup>4</sup>

<sup>1</sup> Sec. 1 of Act of January 28, 1915, Ch. 22.

<sup>2</sup> Sec. 116 Fed. Jud. Code, Act Mar. 3, 1911.

<sup>3</sup> See by analogy Chap. VI. of this book as applicable to appeals and error from the courts of Porto Rico and Hawaii.

<sup>4</sup> See by analogy Chap. V. of this book "Appeals and Error Direct to Supreme Court."



### § 5. Appeals and writs of error from Supreme Courts of Porto Rico and Hawaii—Time.

“SEC. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, and under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review or determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree.” Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of \$5000 may be taken and prosecuted in the circuit courts of appeals.\* (38 Stat. L. 804.)

### § 6. Time for appeal and error—Porto Rico.

On October 19, 1916, the Circuit Court of Appeals for the First Circuit, adopted the following rule relating to appeals and writs of error from the District Court of the United States for the District of Porto Rico and from the Supreme Court of the District of Porto Rico:

“Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ from the Court of Appeals, or from the Court or judge in Porto Rico, as the case may be.”

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\* See by analogy Chap. IX. of this book, dealing with writs of error to State Courts.

### § 7. From the Supreme Court of Philippine Islands. Procedure limited to certiorari.

The jurisdiction of the United States Supreme Court to review the judgments of the Supreme Court of the Philippine Islands has been restricted by the recent Act of Congress to review by certiorari only in force September 6, 1916, which is as follows:

"No judgment or decree rendered or passed by the Supreme Court of the Philippine Islands more than sixty days after the approval of this Act shall be reviewed by the Supreme Court upon writ of error or appeal; but it shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error or appeal, any cause wherein, after such sixty days, the Supreme Court of the Philippine Islands may render or pass a judgment or decree which would be subject to review under existing laws."<sup>1</sup>

### § 8. Special provisions as to courts of Alaska.

"In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals." § 131 of the Federal Judicial Code.

"All appeals and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine. Provided, That at any time before

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<sup>1</sup> Act Sept. 6, 1916, Chap. 448, § 5; 39 Statutes at Large, § 1225b. Consult "Certiorari," Chap. VIII.

the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there." § 135 of the Federal Judicial Code.

By a recent decision of the Supreme Court of the United States, capital cases must be taken to the U. S. Circuit Court of Appeals for the 9th Circuit.<sup>1</sup>

### § 9. Appeals and writs of error from District Court of Alaska direct to the Supreme Court.

"Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska or for any division thereof, direct to the Supreme Court of the United States in the following cases: In prize cases; and in all cases which involve a construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of the state is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Court to the Supreme Court."<sup>2</sup> § 247 Federal Judicial Code (36 Stat. L. 1158.)

<sup>1</sup> *Itow v. United States*, 233 U. S. 581, 34 Sup. Ct. Rep. 699, 58 L. ed. 1102.

<sup>2</sup> See by analogy Chap. V. of this book, "Appeal and Error Direct to Supreme Court."

## CHAPTER XIII

## Appeals in Habeas Corpus Cases

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## § 1. Appeals statutory and of right.

An appeal in habeas corpus cases is purely statutory.<sup>1</sup>

Originally an appeal could be taken in all habeas corpus cases to the Supreme Court of the United States, but, in the distribution of jurisdiction between the United States Circuit Court of Appeals and the Supreme Court of the United States, all appeals from the judgments of the district courts of the United States go to the Circuit Court of Appeals of the United States, except such cases where an appeal or writ of error may be taken directly

to the Supreme Court of the United States under Section 238 of the Judicial Code.<sup>1</sup>

An appeal in a habeas corpus case is a matter of right.<sup>2</sup>

And the only mode of review is by appeal.<sup>3</sup>

### § 2. When writ will issue—No hard and fast rule.

When a person under arrest applies for discharge on a writ of habeas corpus, the issue presented is whether he is unlawfully restrained of his liberty. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in habeas corpus proceedings.<sup>4</sup>

### § 3. Appellate tribunal prescribes mode of appeal—The statute.

Section 765 of the Revised Statutes of the U. S. provides:

"The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause."

### § 4. Custody of prisoner pending appeal—Court rules.!

Rule 34 of the Supreme Court of the U. S. provides:

"1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

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<sup>1</sup> *Ex parte Jim Hong*, 211 Fed. 73; *King v. McClean Asylum*, 64 Fed. 325; *David Burke (C. C. A.)*, 97 Fed. 501; *Webb v. York*, 74 Fed. 753.

<sup>2</sup> *In re Jugiro*, 140 U. S. 291, 35 L. Ed. 510, 11 Sup. Ct. Rep. 770; *Ex parte McCardle*, 6 Wall. 318, 73 U. S. 318, 18 L. Ed. 816; *Ex parte Jim Hong*, 211 Fed. 73.

<sup>3</sup> *Walters v. McKinnis*, 221 Fed. 746; *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; *In re Neagle*, 135 U. S. 42, 34 L. Ed. 64, 10 Sup. Ct. Rep. 660.

<sup>4</sup> *Henry v. Henkel*, 235 U. S. 219, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54.

"2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

"3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required."

The same rule is in force in all the Circuit Courts of Appeal.

### § 5. Acts of State courts pending appeal to Federal Court void.

Section 766 of the Revised Statutes provides:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void. Provided, That no such appeal shall be had or allowed after six months from the date of the judgment or order complained of."

### § 6. Certificate from Federal judge prerequisite to appeal to Supreme Court of U. S. in causes under State process.

By the Act of March 10, 1908 (Ch. 76, 35 Stat. L. 40), it is now the law:

"That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance."

### § 7. Special uses of writ.

(a) Habeas corpus and certiorari are sometimes issued in aid of appellate jurisdiction.<sup>1</sup>

<sup>1</sup>Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; In re Chetwood, 165 U. S. 443, 41 L. Ed. 782, 17 Sup. Ct. Rep. 385; In re Sachs, 190 U. S. 1, 47 L. Ed. 933, 23 Sup. Ct. Rep. 718.

(b) The identity of the prisoner in an extradition proceeding may be inquired into.<sup>1</sup>

(c) In emigration proceedings the facts may be reviewed.<sup>2</sup>

**§ 8. Constitutionality of Act cannot be tested by habeas corpus in criminal cases.**

The earlier cases hold that the constitutionality of a statute may be tested by habeas corpus.<sup>3</sup>

But, in the case of *Johnson v. U. S.*, the Supreme Court flatly laid down the rule that the writ of habeas corpus will not issue to test the constitutionality of a law in a criminal case before trial, and that the only way to bring the Act before the Supreme Court is by writ of error.<sup>4</sup>

And the same rule is applicable to a removal case to another district for trial.<sup>5</sup>

**§ 9. Sufficiency of indictment cannot be tested by habeas corpus.**

The sufficiency of an indictment cannot be raised by habeas corpus.<sup>6</sup>

**§ 10. Cannot replace writ of error.**

The writ cannot perform the office of writ of error.<sup>7</sup>

**§ 11. Administration of State law.**

Ordinarily the Supreme Court of the United States will not issue a writ of habeas corpus until all remedies have been exhausted in vain in the highest courts of the State.<sup>8</sup>

Under the terms of Section 753, Revised Statutes of the United States, in order to entitle a person to the writ of habeas corpus,

<sup>1</sup> *Ex parte Chung Kin Tow*, 218 Fed. 185.

<sup>2</sup> *Whitfield v. Hanges* (C. C. A.), 222 Fed. 745.

<sup>3</sup> *Cooley v. Morgan*, 221 Fed. 252; *In re Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118, 9 Sup. Ct. Rep. 672.

<sup>4</sup> *Johnson v. Hoy*, 227 U. S. 245, 57 L. Ed. 497, 33 Sup. Ct. Rep. 240.

<sup>5</sup> *Henry v. Henkel*, 235 U. S. 219, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54.

<sup>6</sup> *Drew v. Thaw*, 235 U. S. 432, 59 L. Ed. 302, 35 Sup. Ct. Rep. 137.

<sup>7</sup> *McMicking v. Shields*, 238 U. S. 99, 59 L. Ed. 1220, 35 Sup. Ct. Rep. 665.

<sup>8</sup> *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; *United States v. Sing Tuck*, 194 U. S. 161, 48 L. Ed. 917, 24 Sup. Ct. Rep. 621.

it must appear that he is held in custody in violation of the Constitution of the United States.<sup>1</sup>

**§ 12. Errors of law not reviewable by habeas corpus.**

Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error.<sup>2</sup>

In a habeas corpus proceeding, under a process of a state court, the inquiry is directed to the question whether the prisoner is deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.<sup>3</sup>

It is, indeed, settled by repeated decisions of the United States Supreme Court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the Federal questions arising upon the record have been brought before the Supreme Court of the United States upon writ of error.<sup>4</sup>

<sup>1</sup> *Leo M. Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256, 26 Sup. Ct. Rep. 87.

<sup>2</sup> *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969; *Markuson v. Boucher*, 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Baker v. Grice*, 169 U. S. 284, 290, 42 L. Ed. 748, 750, 18 Sup. Ct. Rep. 323; *Re Frederick*, 149 U. S. 70, 75, 37 L. Ed. 653, 656, 13 Sup. Ct. Rep. 793; *Ex parte Royall*, 117 U. S. 241, 250, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; *Ex parte Siebold*, 100 U. S. 371, 375, 25 L. Ed. 717, 718; *Ex parte Parks*, 93 U. S. 18, 21, 23 L. Ed. 787, 788.

<sup>3</sup> *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 59 L. Ed. 969.

<sup>4</sup> *Urquhart v. Brown*, 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459; *Markuson v. Boucher*, 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Tinsley v. Anderson*, 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Baker v. Grice*, 169 U. S. 284, 291, 42 L. Ed. 748, 750, 18 Sup. Ct. Rep. 323; *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. Ed. 406, 412, 16 Sup. Ct. Rep. 297; *Re Frederick*, 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793; *Ex parte Royall*, 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; and see *Henry v. Henkel*, 235 U. S. 219, 228, ante, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54.



**§ 13. Contempt before Congressional Committee.**

Habeas corpus will not lie to release from imprisonment, upon an indictment charging the defendant with refusing contrary to §§ 101-104 (U. S. Compiled Statutes 1901) to testify and give information to a Congressional Committee. Whether the Congressional Committee acted within jurisdiction is a matter to be argued before the court where the indictment is pending.<sup>1</sup>

**§ 14. Removal proceedings.**

The indictment in a removal proceeding constitutes prima facie evidence of probable cause, but is not conclusive. The defendant in a habeas corpus proceeding may show by evidence that no indictable offense was committed in the district in which the indictment was returned.<sup>2</sup>

**§ 15. Deportation cases.**

Habeas corpus may be resorted to to review an order for the deportation.<sup>3</sup>

**§ 16. Inquiry limited to question whether petitioner had fair hearing.**

The courts are not authorized to interfere with an order of deportation made after a fair hearing, even though the evidence be slight upon which the order is based, if there be any evidence whatever to support it. But it has been uniformly held that where

<sup>1</sup> Henry v. Henkel, U. S. Sup. Ct. 235 U. S. 219, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54.

<sup>2</sup> Beavers v. Henkel, 194 U. S. 73, 48 L. Ed. 882, 24 Sup. Ct. Rep. 605; Benson v. Henkel, 198 U. S. 1, 49 L. Ed. 919, 25 Sup. Ct. Rep. 569; Hyde v. Shine, 199 U. S. 62, 50 L. Ed. 90, 25 Sup. Ct. Rep. 760; Greene v. Henkel, 183 U. S. 261, 46 L. Ed. 189, 22 Sup. Ct. Rep. 223; Tinsley v. Treat, 205 U. S. 20, 51 L. Ed. 689, 27 Sup. Ct. Rep. 430.

<sup>3</sup> Hanges v. Whitfield, 209 Fed. 675; Ex parte Gytel, 210 Fed. 918; Ex parte Lam Pui, 217 Fed. 465; Chin Low v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; Wong Wing v. United States, 163 U. S. 228, 237, 238, 239, 16 Sup. Ct. Rep. 977, 41 L. Ed. 140; United States v. Sibray (C. C.), 178 Fed. 144; United States v. Williams (D. C.), 185 Fed. 598; Roux v. Commissioner of Immigration, 203 Fed. 413, 121 C. C. A. 523; United States v. Williams (D. C.), 193 Fed. 228; Hanges v. Whitfield, 209 Fed. 676.

the petitioner has not been accorded a fair hearing within the meaning of the law, it is the duty of the court to intervene.<sup>1</sup>

The court will not in proceedings of this character consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the court may, and it is its duty to consider the manner of procuring the testimony, its competency, and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial.<sup>2</sup>

### § 17. Right of deportation—How to be exercised.

Long, and frequently sad, experience teaches that when officers, intrusted with the administration of laws affecting the liberty of men, are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representatives in Congress in clear and unmistakable terms and by rules of departments conferring such power upon inspectors.<sup>3</sup>

### § 18. Release conditional.

If a writ of habeas corpus is allowed on the ground that the immigration officials did not afford the alien a hearing, the order of release should be made conditional and to be effective only in case those officers should fail to give the alien the fair hearing

<sup>1</sup> *Ex parte Sata*, 215 Fed. 176; *In re Jem Yuem*, 188 Fed. 351; *Japanese Immigration Case v. United States*, 189 U. S. 86, 47 L. Ed. 721, 23 Sup. Ct. Rep. 611; *United States ex rel. N. G. Sam v. Redfern*, 210 Fed. 548.

<sup>2</sup> *Ex parte Lam Pui*, 217 Fed. 463; *Hanges v. Whitfield* (D. C.), 209 Fed. 675; *Chin Low v. United States*, 208 U. S. 8, 28 Sup. Ct. Rep. 201, 52 L. Ed. 369; *United States v. Quan Wah* (D. C.), 214 Fed. 462; *United States v. Lou Chu* (D. C.), 214 Fed. 463.

<sup>3</sup> *Ex parte Lam Pui*, 217 Fed. 465; *Hanges v. Whitfield*, 209 Fed. 675.

on lawful evidence required by the Immigration Act within a reasonable time.<sup>1</sup>

### § 19. When challenge of jurisdiction permitted.

In deportation cases it is well settled that, when the petitioner challenges the jurisdiction of the court or the tribunal by whose mandate he is deprived of his liberty and is held in custody, he may do so upon the return to the writ of habeas corpus. If there be no jurisdiction, no power vested in the tribunal, or officer to deprive him of his liberty, the mandate upon which the ministerial officer acts is utterly null and void, and petitioner is unlawfully restrained of his liberty.<sup>2</sup>

### § 20. Summary of the doctrine.

The doctrine is aptly summed up in *Horner v. United States*, supra, where the petitioner at the time of presenting his petition had been committed by a United States commissioner to await the action of the grand jury on a charge of illegally conducting a lottery; his contention being that the charge involved no offense under the statute. The Supreme Court in affirming the judgment of the court below dismissing the writ, said, in response to the contention:

“But we are of opinion that that question ought to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court, on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. In *re Cortes*, 136 U. S. 330 (10 Sup. Ct. 1031, 34 L. Ed. 446); *Stevens v. Fuller*, 136 U. S. 468 (10 Sup. Ct. 911, 34 L. Ed. 461). The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. . . . Whether the scheme was a lottery is a question to be determined in the administration of the jurisdiction. It is not for this court to determine that question in advance. The principle is the same as that involved in *Re Fassett*, 142 U. S. 479, 483, 484 (12 Sup. Ct. 295, 35 L. Ed. 1087). The case presents for the

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<sup>1</sup> *United States v. Petkos*, 214 Fed. 978 (C. C. A. 1st Cir.).

<sup>2</sup> *United States v. Tsuji*, 199 Fed. 750; *Ex parte Lam Pui*, 217 Fed. 462.

determination of the court in which the indictment may be found the question as to whether the scheme was a lottery, and it is not for any court to determine it in advance on habeas corpus. If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus."<sup>1</sup>

### § 21. Extradition cases.

Consult the following cases in regard to extradition cases.<sup>2</sup>

### § 22. Former jeopardy.

The following cases may be examined in regard to pleas of former jeopardy.<sup>3</sup>

### § 23. Under process of the House of Representatives.

The courts will not interfere by habeas corpus under a commitment based upon an order of the House of Representatives, when that body, or a committee appointed by it, acts in a judicial capacity.<sup>4</sup>

<sup>1</sup> U. S. ex rel. Fong On v. McCarthy, 228 Fed. 398; Horner v. United States, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; In re Cortes, 136 U. S. 330 (10 Sup. Ct. 1031, 34 L. Ed. 446); Stevens v. Fuller, 136 U. S. 463 (10 Sup. Ct. 911, 34 L. Ed. 461); Re Fassett, 142 U. S. 479, 483, 484 (12 Sup. Ct. 295, 35 L. Ed. 1087).

<sup>2</sup> Botis v. Davies, 173 Fed. 996; In re Petterson, 166 Fed. 536; In re Swan, 150 U. S. 637, 137 L. Ed. 1207, 14 Sup. Ct. Rep. 225; Ex parte Page, 214 Fed. 256; Robert v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291.

<sup>3</sup> Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; Ball v. United States, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; Bryant v. United States, 214 Fed. 51 (C. C. A. 8 Circuit).

<sup>4</sup> United States ex rel. Marshall v. Gordon, 235 Fed. 422.

## CHAPTER XIV

## Contempt of Court—Review

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## § 1. The power of the Federal courts, § 268 Federal Judicial Code.

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the mis-

behavior of any officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

§ 268 of the Federal Judicial Code.

## § 2. Construction of statute.

The courts of the United States have the inherent power to punish for contempt.<sup>1</sup>

A United States commissioner has no power to punish for contempt in proceedings held before him. The court appointing him has such power.<sup>2</sup>

The process of contempt is a severe remedy and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct.<sup>3</sup>

## § 3. No change of venue or jury trial.

A defendant charged with contempt is not entitled to a change of venue,<sup>4</sup> or trial by jury.<sup>5</sup>

## § 4. "Presence of the court" defined.

The clause "so near the presence of the court as to obstruct the administration of justice" does not have reference to physical measurements but is to be concluded from all the attending circumstances and effect intended.<sup>6</sup>

<sup>1</sup> *Stuart v. Reynolds*, 204 Fed. 714; *In re Maury*, 205 Fed. 629; *United States v. Shipp*, 203 U. S. 572, 27 Sup. Ct. Rep. 167, 51 L. Ed. 324; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77.

<sup>2</sup> *U. S. v. Shipp*, 203 U. S. 563, 27 Sup. Ct. Rep. 165, 51 L. Ed. 319; *U. S. v. Beavers*, 125 Fed. 778.

<sup>3</sup> *Stuart v. Reynolds*, 204 Fed. 726; *California Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106, 5 Sup. Ct. Rep. 618.

<sup>4</sup> *Merchants, etc., v. Board of Trade*, 201 Fed. 26.

<sup>5</sup> *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31, 33 L. Ed. 801, 10 Sup. Ct. Rep. 424; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. Rep. 1125; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1022, 15 Sup. Ct. Rep. 900; *Merchants' S. & G. Co. v. Board of Trade of Chicago*, 201 Fed. 25; *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 798.

<sup>6</sup> *U. S. v. Toledo Newspaper Co.*, 220 Fed. 458, Sup. Ct. Affd., 237 Fed. 986; *Ex parte Terry*, 128 U. S. 290, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77; *In re Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 699.

Federal courts may punish only for contempt made in their presence or for disobedience of its lawful process, but not for making newspaper criticism.<sup>1</sup>

The court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors, and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court.<sup>2</sup>

### § 5. Falsification of evidence.

Where a deposition was taken and published in furtherance of a conspiracy to impose upon the Federal Court in another State, it is held that said acts do not come within the clause punishing for contempt "any misbehavior so near or in the presence of the court as to obstruct the administration of justice" unless said deposition was actually offered or used as evidence in said time.<sup>3</sup>

### § 6. Misconduct in court.

If one inside a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court; yet it is not misconduct in which an individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature.<sup>4</sup>

### § 7. Obstruction of due administration of justice.

The act of sending threatening letters to a Federal judge at his home where he frequently heard matters in chambers relating to matters pertaining to a pending cause constitutes a "contempt" punishable by the court.<sup>5</sup>

<sup>1</sup> *Cuyler v. A. & N. C. R. Co.*, 131 Fed. 95; *U. S. v. Toledo Newspaper Co.*, 220 Fed. 458.

<sup>2</sup> *U. S. v. Toledo Newspaper Co.*, 220 Fed. 458; *Matter of Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 699.

<sup>3</sup> *Doniphan v. Lehman*, 179 Fed. 173, *U. S. v. Toledo Newspaper Co.*, supra.

<sup>4</sup> *Proudfit L. L. Co. v. Kalamazoo L. L. B. Co.*, 230 Fed. 120; *Bessette v. Conkey*, 194 U. S. 329, 24 Sup. Ct. Rep. 667, 48 L. Ed. 997.

<sup>5</sup> *U. S. v. Huff*, 206 Fed. 705.

**§ 8. Attack on plaintiff's attorney.**

Attacking without provocation the plaintiff's attorney on the street in full view of the jury room constitutes contempt of court.<sup>1</sup>

**§ 9. Attempt to influence jurymen on street.**

An attempt to influence a jurymen on the street in the vicinity of the court is a contempt of court.<sup>2</sup>

**§ 10. Attorney an officer of court.**

An attorney is a recognized officer of the courts of the United States and is amenable to punishment for contempt under the section of the statute authorizing such courts to punish for contempt any of the officers of said courts for misbehavior in their official capacity.<sup>3</sup>

**§ 11. Assault on officer on duty.**

It is a contempt of court to assault a judicial officer in the performance of his duty as required by said court.<sup>4</sup>

**§ 12. Language intended to incite.**

Language or conduct intended to incite others to violation of the court's orders is a contempt of court.<sup>5</sup>

**§ 13. Advice of counsel no defense on failure to produce papers.**

Where a defendant insisted that he refused to produce certain papers, in response to an order to do so on a subpoena duces tecum, on the advice of counsel, it is not a defense in a contempt proceeding against him for deliberately disobeying the court order requiring him to comply with the subpoena.<sup>6</sup>

**§ 14. Interference with property in custody of Bankruptcy Court.**

When property is in the custody of the Bankruptcy Court, no

<sup>1</sup> U. S. v. Barrett, 187 Fed. 378, U. S. v. Huff, supra.

<sup>2</sup> U. S. v. Carroll, 147 Fed. 947, U. S. v. Huff, supra.

<sup>3</sup> In re Dialogue, 215 Fed. 462; Ex parte Davis, 112 Fed. 139; Leber v. U. S. 170 Fed. 881.

<sup>4</sup> Ex parte McLeod, 120 Fed. 130; U. S. v. Huff, 206 Fed. 700.

<sup>5</sup> U. S. v. Colorado, 216 Fed. 654; United States v. Debs (C. C.), 64 Fed. 724; In re Debs, 158 U. S. 564; United States v. Haggerty (C. C.), 116 Fed. 510; United States v. Gehr (C. C.), 116 Fed. 520.

<sup>6</sup> In re Munroe, 210 Fed. 326.



other court, and no person acting under any process from any other court, can without the permission of the Bankruptcy Court, interfere with it; and to so interfere is a contempt of the Bankruptcy Court.<sup>1</sup>

### § 15. Inability to comply with order.

Where a bankrupt has not the means to pay over money in compliance with an order, he cannot be punished by summary imprisonment, though he may have committed an offense under the Bankruptcy Act.<sup>2</sup>

### § 16. Classes of contempt—Distinction between civil and criminal.

If the contempt is civil, the punishment is remedial, and for the benefit of the complainant. The contempt is criminal if the proceeding is to vindicate the authority of the court.<sup>3</sup>

Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main suit; but, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original case.<sup>4</sup>

### § 17. Review of civil contempt, when allowed.

A judgment in civil contempt arising in an equity suit may be reviewed only after final decree of the principal cases,<sup>5</sup> but an

<sup>1</sup> Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. Rep. 1019, 38 L. Ed. 981; Freeman v. Howe, 24 How. 450, 459, 16 L. Ed. 749; U. S. v. Colorado, 216 Fed. 654; In re Litchfield, 13 Fed. 863; Ex parte Davis, 112 Fed. 139; Royal Trust Co. v. Washburn, etc., Ry. Co., 113 Fed. 531; In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900, 39 L. Ed. 1092; In re Acker, 66 Fed. 290.

<sup>2</sup> In re McNaught, 225 Fed. 511; In re Davison, 143 Fed. Rep. 673; In re Levy & Co., 15 Am. Bankr. Rep. 166, 142 Fed. 442; Stuart v. Reynolds, 204 Fed. 718; Boyd v. Glucklich, 116 Fed. Rep. 131.

<sup>3</sup> Gompers v. Buck Stove & Range Co., 221 U. S. 441, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797; Phillips, etc., v. Amalgamated Ass'n, 208 Fed. 335.

<sup>4</sup> Puget Sound Traction Light & Power Co. v. Lawery, 202 Fed. 265; Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797; United States v. Huff, 206 Fed. 700.

<sup>5</sup> Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. Rep. 814, 30 L. Ed. 853; Merchants' S. & G. Co. v. Board of Trade of Chicago, 201 Fed. 25.

order or decree of the District Court inflicting a fine or imprisonment as a punishment for contempt, as distinguished from such infliction intended to compel action for the benefit of a party, is a final decision or judgment subject to review by writ of error to the Circuit Court of Appeals.<sup>1</sup>

### § 18. Diligence in prosecuting civil contempt.

Where a complainant has waited an unreasonable length of time to commence a proceeding for an attachment for contempt although he is at all times in possession of the facts supporting such proceeding, the application will be denied by the court.<sup>2</sup>

### § 19. Punishment for civil contempt.

The court cannot punish a civil contempt by imprisonment for a definite term. The only punishment is by fine measured in the amount of the pecuniary injury, and the party against whom the proceeding is instituted is entitled to the protection of the constitutional provisions against self-incrimination.<sup>3</sup>

### § 20. Procedure in criminal contempt.

A criminal contempt should have a title of its own, inasmuch as it is a distinct proceeding from the main cause.<sup>4</sup>

Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause.

Proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause.<sup>5</sup>

### § 21. Information against defendant.

There is no fixed formula for contempt proceedings, and

<sup>1</sup> *Proudfit L. L. Co. v. Kalamazoo L. L. B. Co.*, 230 Fed. 920; *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. Rep. 667, 48 L. Ed. 997; *In re Christensen*, 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 L. Ed. 1072; see also Chap. III., § 9.

<sup>2</sup> *Matheson v. Hanna Schoellkopf Co.*, 122 Fed. 836.

<sup>3</sup> *Morehouse v. Giant Powder Co.*, 206 Fed. 26; *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797.

<sup>4</sup> *Anargyros v. Anargyros & Co.*, 191 Fed. 208; *Phillips Sheet & T. P. Co. v. Amalgamated A. of I. S. & T. W.*, 208 Fed. 335.

<sup>5</sup> *Gompers v. Buck Stove & Range Co.*, 221 U. S. 445, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797.

technical accuracy is not required. It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged; and this is to be determined by examination of the entire record.<sup>1</sup>

### § 22. Contempt out of court—Affidavits necessary.

It is the generally recognized rule that process of arrest for contempt not committed in the court's presence can properly issue only upon the filing of affidavit stating positively the facts and in such way as *prima facie* to show the commission of a contempt.<sup>2</sup>

Defendants are unquestionably entitled to be informed of the charge made against them and so clearly and definitely as not only to show *prima facie* a case against them, but that when arraigned they might know what answer to make and to enable them to prepare their defense.<sup>3</sup>

### § 23. Criminal contempt—Privileges of defendant.

In a criminal contempt proceeding the defendant cannot be called as a witness against himself and compelled to incriminate himself.<sup>4</sup>

### § 24. Weight of evidence not reviewed.

It is a well-established principle that in a case of criminal contempt the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, and evidence showing guilt resulting in a finding of such facts cannot be reviewed by an

<sup>1</sup> *Creekmore v. United States*, 237 Fed. 743 (C. C. A. 8th Cir.); *Schwartz v. United States*, 217 Fed. Rep. 868; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.), 874; *Aaron v. United States*, 155 Fed. 833, 84 C. C. A. 67; *United States v. Huff* (D. C.), 206 Fed. 700.

<sup>2</sup> *Sona v. Aluminum Castings Co.*, 214 Fed. Rep. 938.

<sup>3</sup> *Sona v. Aluminum Castings Co.*, 214 Fed. Rep., 939; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 446, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.), 874; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

<sup>4</sup> *U. S. v. José*, 63 Fed. 951; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. Rep. 195, 35 L. Ed. 1110; *Merchants' S. & G. Co. v. Board of Trade of Chicago*, 201 Fed. 27; *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. Ed. 746; *In re Nickell*, 47 Kansas 734, 28 Pac. 1076.

Appellate Court. The inquiry is limited to the question whether there was any evidence upon which to predicate the finding.<sup>1</sup>

### § 25. Perjury in civil proceeding—When not contempt.

The court cannot inflict punishment for criminal contempt or apparent perjury, for the purpose of forcing the production of evidence or payment of property and money in the civil proceeding.<sup>2</sup>

It has, however, been held that the court has power to treat as a criminal contempt a persistent perjury which blocks the inquiry, on the ground that it is impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.<sup>3</sup>

### § 26. Relation to original proceeding.

There is authority for the proposition that the criminal contempt is so far distinct from the original civil proceedings that the order of injunction must be formally introduced. But this rule is too technical. The better view is that, as one proceeding grows out of the other and is collateral to it, the court will take judicial notice in the trial of the latter of all orders made in the former.<sup>4</sup>

### § 27. Decree should indicate hearsay evidence rejected.

Where hearsay evidence is admitted at a hearing for contempt and the decree finds the defendants guilty of contempt the decree should indicate what evidence was rejected by the court.<sup>5</sup>

### § 28. Nature of pleading.

There must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor.<sup>6</sup>

<sup>1</sup> *Schwartz v. United States*, 217 Fed. Rep. 868; *Bessette v. Conkey Co.*, 194 U. S. 338, 24 Sup. Ct. Rep. 665, 48 L. Ed. 997.

<sup>2</sup> *In re Rosenzweig*, 206 Fed. 362.

<sup>3</sup> *United States v. Appel*, 211 Fed. 495; *In re Schulman* (C. C. A. 2d Cir.), 23 Am. Bankr. Rep. 809, 177 Fed. 191, 101 C. C. A. 361.

<sup>4</sup> *Schwartz v. United States*, 217 Fed. Rep. 868.

<sup>5</sup> *Oates v. United States*, 223 Fed. 1013.

<sup>6</sup> *Gompers v. Buck Stove & Range Co.*, 221 U. S. 441, 31 Sup. Ct. Rep. 492, 55 L. Ed. 797.

**§ 29. Disobedience of order of Supreme Court.**

Aiding and abetting or participating in the execution or attempted execution of a prisoner sentenced by a State Court and held in jail pending the disposition of a writ of habeas corpus constitutes a contempt of court. The contempt is not mitigated nor destroyed by the fact that the Federal Court had no jurisdiction to issue the writ. If the attempted murder takes place during the pendency of an appeal in the Supreme Court of the United States, it will constitute a contempt of the Supreme Court.<sup>1</sup>

**§ 30. Cannot be purged by mere answer.**

A mere answer under oath denying the charges set forth in the contempt proceedings is insufficient to entitle a party charged with contempt to a discharge. If a prima facie case is shown for the prosecution, the defendant must answer and prove his innocence in the same manner as in any other criminal case.<sup>2</sup>

**§ 31. Contempt conviction no bar to criminal prosecution.**

A conviction upon a charge of contempt for an offense which is also a crime does not bar a prosecution for the crime.<sup>3</sup>

An act which is contempt of court and also a crime may be punished both by the summary provision and by the indictment, and neither will bar the other.<sup>4</sup>

<sup>1</sup>United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. Rep. 165, 51 L. Ed. 319; United States v. Shipp, 214 U. S. 386, 29 Sup. Ct. Rep. 637, 53 L. Ed. 1041.

<sup>2</sup>United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. Rep. 165, 51 L. Ed. 319; United States v. Shipp, 214 U. S. 386, 29 Sup. Ct. Rep. 637, 53 L. Ed. 1041; United States v. Huff, 208 Fed. 703; In re Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. Ed. 150; Kirk v. United States, 192 Fed. 273.

<sup>3</sup>Merchants' Stock & Grain Co. v. Board of Trade, 201 Fed. 20; United States v. Sweeney, 95 Fed. 445; O'Neal v. U. S., 190 U. S. 36, 23 Sup. Ct. Rep. 776, 47 L. Ed. 945; Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 L. Ed. 997.

<sup>4</sup>Chicago Directory Co. v. United States Directory Co., 123 Fed. 194; O'Neil v. People, 113 Ill. App. 195; Phillips S. & T. P. Co. v. Amalgamated Ass'n, 208 Fed. 335.

**§ 32. Criminal Contempt—Mode of review.**

A judgment of criminal contempt is reviewable only by writ of error.<sup>1</sup>

**§ 33. Criminal contempt by a stranger to record.**

A punitive contempt against one not a party to the suit can be reviewed by writ of error only, and not by appeal.<sup>2</sup>

**§ 34. Petition to revise in civil contempt in bankruptcy.**

Review of a judgment of a civil contempt growing out of a bankruptcy proceeding is reviewable by a petition to revise.<sup>3</sup>

**§ 35. Mandamus from Supreme Court to Court of Appeals to entertain jurisdiction in contempt.**

Mandamus is the proper remedy to compel the Circuit Court of Appeals to take jurisdiction of a writ of error in a contempt case.<sup>4</sup>

**§ 36. Innocent conduct as contempt—Review of State Court.**

A Federal question is presented if a State Court makes innocent conduct as an arbitrary pretense for an arbitrary punishment for contempt of court, but minor matters of local law, punishable by local law cannot be reviewed in any form by a Federal tribunal.<sup>5</sup>

**§ 37. Imprisonment.**

Imprisonment in the penitentiary for a year and a day may be inflicted for contempt of court.<sup>6</sup>

<sup>1</sup> *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 L. Ed. 997; *Bucklin v. United States*, 159 U. S. 681, 16 Sup. Ct. Rep. 182, 40 L. Ed. 304; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *O'Neal v. U. S.*, 190 U. S. 36, 23 Sup. Ct. Rep. 776, 47 L. Ed. 945; *Grant v. United States*, 227 U. S. 78, 33 Sup. Ct. Rep. 190, 57 L. Ed. 423; see also Chap. II., § 9.

<sup>2</sup> *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. Rep. 665, 48 L. Ed. 997.

<sup>3</sup> *Freed v. Central Trust Co. of Illinois*, 215 Fed. 873 (C. C. A. 7th Circuit).

<sup>4</sup> *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 642, 32 Sup. Ct. Rep. 339, 56 L. Ed. 584; *In re Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. Rep. 729, 48 L. Ed. 1072.

<sup>5</sup> *Patterson v. Colorado, ex rel. Attorney-General*, 205 U. S. 454, 466, 27 Sup. Ct. Rep. 556, 51 L. Ed. 879.

<sup>6</sup> *Creekmore v. U. S.*, 237 Fed. 743.

## CHAPTER XV

## Federal Appellate Procedure.

## I. PRELIMINARY STEPS FOR SECURING APPEAL OR WRIT OF ERROR

- | SEC.   | SEC.   |
|--|--|
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- | Sec.  | Sec.   |
|---|--|
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### § 1. Former practice of King's Bench retains to limited extent in Supreme Court.

Rule 3 of the U. S. Supreme Court provides :

“This Court considers the former practice of the Courts of King's Bench and of Chancery in England, as affording outlines for the practice of this Court; and will from time to time make such alterations therein as circumstances may render necessary.”

### § 2. Time for appeal, etc.—to Supreme Court, three months; Philippine Islands, six months.

By the Act of September 6, 1916, Chapter 448, Section 6, it is now the law that “no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months.” (39 Stat. L.)

### § 3. Time for appeal or error to U. S. Court of Appeals—six months.

Section 11 of the Act of March 3, 1891, provides:

“That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree, sought to be reviewed: Provided, however, That in all



cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Court of Appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error. And any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.<sup>1</sup>

#### § 4. In interlocutory appeals—30 days.

Appeal must be taken within thirty (30) days from entry of order appealed from.<sup>1</sup>

#### § 5. In civil anti-trust causes—60 days.

Appeals to Supreme Court must be taken within sixty (60) days from entry of final decree under § 2, Act of February 11, 1903.<sup>2</sup>

But it would seem that under the statute quoted in § 2 the time is extended to three months.

#### § 6. In capital cases—60 days.

Writ of error in capital cases must be filed in same term or within sixty (60) days after expiration of term of court at which trial had, when allowed for cause.<sup>3</sup>

#### § 7. Date of allowance of appeal or error not material, if prayed in time.

When an appeal is prayed within the statutory time, the mere date of its allowance by the court is not controlling.<sup>4</sup>

<sup>1</sup> Ward Baking Co. v. Weber Bros., 230 Fed. 142; Hultberg v. Anderson, 214 Fed. 380, § 129 Federal Judicial Code; Re Haberman Mfg. Co., 147 U. S. 530, 37 L. Ed. 266, 13 Sup. Ct. Rep. 527; Rowan v. Ide, 107 Fed. 161, 46 C. C. A. 214; Root v. Mills, 168 Fed. 688, 94 C. C. A. 174; Baxter v. Beval Phillips & Co., 219 Fed. 309.

<sup>2</sup> § 2, C. 544, 1903, 32 Stat. 823.

<sup>3</sup> § 6, Act. Feb. 6, 1889, C. 113, 25 Stat. 656.

<sup>4</sup> Randall Co. v. Fogleson Machine Co., 200 Fed. 741, 119 C. C. A. 185; U. S. v. Vigil, 10 Wall. 423, 19 L. Ed. 954; Cardona v. Qumones, 240 U. S. 83, 36 Sup. Ct. Rep. 346, 60 L. Ed. 538.

**§ 8. When the time to appeal may be extended.**

When the delay in securing the appeal or error was not the fault of appellant, the time may be extended.<sup>1</sup>

**§ 9. How time is calculated.**

Care should be taken to file the papers at once with the clerk of the court in which the judgment was rendered, because it is the issuing and filing of the writ with the clerk of the court which entered the judgment appealed from that removes the record from the inferior court to the Appellate Court. The period of limitation prescribed by the statute is calculated as of the day of filing of the papers and not from the date of the allowance of the writ. The writ is not sued out until filed with the clerk of the court which entered the judgment with a copy for the opposite party.<sup>2</sup>

**§ 10. When the time commences to run.**

The time does not commence to run until the court has disposed of a petition for rehearing or motion to set aside the judgment or decree.<sup>3</sup>

**§ 11. Time to appeal cannot be extended by stipulation.**

The statutory time to take an appeal or error cannot be extended by stipulation of the parties or the court. It is jurisdictional.<sup>4</sup>

<sup>1</sup> *Randall Co. v. Fogleson Mach. Co.*, 200 Fed. 741, 119 C. C. A. 185; *Toledo M. W. Co. v. Foyer Bros. & Co.*, 223 Fed. 350, 351.

<sup>2</sup> *Robins Dry Dock Co.*, 216 Fed. 14; *Kentucky Coal & Lumber Co. v. Howes*, 153 Fed. 163, 82 C. C. A. 337; *City of Waxahachie v. Coler*, 92 Fed. 284; *U. S. v. Basler*, 51 Fed. 624 (C. C. A.); *Cincinnati S. & L. Co. v. Grand Rapids S. D. Co.*, 146 U. S. 55, 13 Sup. Ct. Rep. 13, 36 L. Ed. 886; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. Rep. 906, 44 L. Ed. 1088; *Threadgill v. Platt*, 71 Fed. 3; *Blaffer v. New Orleans Water Supply Co.*, 160 Fed. 391; *Stevens v. Clark*, 62 Fed. 321 (C. C. A.); *Green v. Lynn* (C. C. A.), 87 Fed. 839; *Johnson v. Meyers* (C. C. A.), 54 Fed. 417; *Scarborough v. Pargoud*, 108 U. S. 568, 2 Sup. Ct. Rep. 877, 27 L. Ed. 824.

<sup>3</sup> *Omaha El. L. & P. Co. v. City of Omaha*, 216 Fed. 848; *Baxter v. Beval Phillips & Co.*, 219 Fed. 309; *Aspen Min. Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. Rep. 4, 37 L. Ed. 986; *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 18 Sup. Ct. Rep. 786, 42 L. Ed. 1192.

<sup>4</sup> *Darnell v. Illinois C. R. Co.*, 206 Fed. 445; *1st National Bank of Fort Wayne v. Library Bureau*, 211 Fed. 113; *In re Donnelly*, 211 Fed. 118; *Stevens v. Clark*, 62 Fed. 324, 10 C. C. A. 379.

## § 12. Who may allow appeal or error to the Supreme Court of the United States.

Paragraph 1 of Supreme Court Rule 36 provides:

"An appeal or a writ of error from a district court direct to this court, in the cases provided for in Sections 238 and 252 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, Chapter 231, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal."

## § 13. To U. S. Court of Appeals.

Appeals or writs of error to the U. S. Circuit Court of Appeals from the District Court may be allowed by a judge of the District Court, and any judge or justice of the United States Court of Appeals or a justice of the Supreme Court assigned to the judicial circuit has the power to allow an appeal or writ of error to the United States Circuit Court of Appeals and to grant supersedeas and make all orders relating to the perfection of the appeal. The practice is substantially the same as in the U. S. Supreme Court except in so far as may be modified by some rule of court.<sup>1</sup>

## § 14. Power of judge of Circuit Court of Appeals.

Section 132 of the Federal Judicial Code provides:

"Any judge of a Circuit Court of Appeals, in respect of cases brought or to be brought before that Court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States respectively."<sup>2</sup>

## § 15. Special procedure in bankruptcy appeals.

The procedure in bankruptcy appeals is the same as in cases in equity.

<sup>1</sup> See Rule XXXV., U. S. Court of Appeals, 2d Circuit.

<sup>2</sup> For form of petition, assignments of error, order allowing appeal or error, citation, and bond, see appendix.

Bankruptcy Rule XXXVI. promulgated by the Supreme Court of the U. S. provides:

"1. Appeals from a Court of Bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a Judge of the Court appealed from or of the Court appealed to, and shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in the Courts of the United States.

"2. Appeals under the Act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any Court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a Judge of the Court appealed from, or by a Justice of the Supreme Court of the United States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the Court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

### § 16. In bankruptcy appeals joint parties must unite or sever record.

The general rule that parties against whom a joint judgment or order is rendered must unite in an appeal or sever the record is applicable to appeals in bankruptcy proceedings.<sup>1</sup>

### § 17. Petition and assignment of errors.

Par. 1 of Rule 35 of the U. S. Supreme Court prescribes the method of assigning errors, and is as follows:

"1. Where an appeal or a writ of error is taken from a District Court direct to this Court, under Section 238 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, Chapter 231, the plaintiff in error or appellant shall file with the clerk of the court below, *with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged.* No writ or error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection

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<sup>1</sup> In re Dandridge & Pugh, 209 Fed. 838; see Chapter III., Severance, §§ 11-14. For further particulars on bankruptcy appeals see Chap. VI.

of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it.

"When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, *but the court at its option, may notice a plain error not assigned.*"

The above requirements are identical in the U. S. Circuit Court of Appeals for the second circuit.<sup>1</sup>

### § 18. Order allowing appeal or error.

An appeal is allowed by taking the security and signing the citation, although no formal order of allowance was made.<sup>2</sup>

The better and safer practice is, however, to have an order allowing the appeal duly signed. The judge acts in the capacity of judge and not as a court.<sup>3</sup>

### § 19. Writ of error—How issued and served.

A writ of error may be issued by the clerk of the District Court or Supreme Court.<sup>4</sup>

A writ of error is usually served by the depositing of a copy of same for the benefit of the adverse party with the clerk of the court to which it is addressed.<sup>5</sup>

The absence of a seal on a writ of error does not invalidate the writ.<sup>6</sup>

A writ of error must be filed with the clerk of the court

<sup>1</sup> See, Court of Appeals, Rule XI.

<sup>2</sup> *Kendrick v. Roberts*, 214 Fed. 268; *Sage v. Railroad Company*, 96 U. S. 712, 24 L. Ed. 641; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989; *Re Goodman*, 101 Fed. 920, 42 C. C. A. 85; *Farmers' Loan & Trust Co. v. Chicago N. P. R. Co.*, 73 Fed. 314, 19 C. C. A. 477; *Chamberlain Transportation Co. v. South Pier Coal Co.*, 126 Fed. 167, 61 C. C. A. 109.

<sup>3</sup> For form of order see appendix.

<sup>4</sup> *Ex parte Ralston*, 119 U. S. 614, 7 Sup. Ct. Rep. 317, 30 L. Ed. 506. For form see *Freeman v. U. S.* 227 Fed. 732.

<sup>5</sup> *U. S. v. Alamagorda Lumber Co.*, 202 Fed. 700; *Davidson v. Laurel*, 4 Wall. 447, 18 L. Ed. 377; *Wood v. Lide*, 4 Cranch 181, 2 L. Ed. 588.

<sup>6</sup> *Chicago Great Western R. R. Co. v. Le Valley*, 223 Fed. 384, 386, but see *Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863.

which rendered the judgment and transmitted to the court or the case will not be considered.<sup>1</sup>

It has been held in one case that it is indispensable that the clerk should put his file mark upon the writ of error.<sup>2</sup>

### § 20. Form of writ of error.

The form prescribed by the Supreme Court of the United States provides that the writ should be issued in the name of the President of the United States and have the *teste* of the Chief Justice and the clerk of the Supreme Court of the United States. By a later act the clerks of the District Court have also the power to sign the writ of error. Accordingly, the clerk of the State Court therefore has no power to sign the writ. Upon the allowance of the writ of error by the Chief Justice of the highest court of a state, or a justice of the Supreme Court, the order should be presented to the clerk of the U. S. Supreme Court or U. S. District Court for signature and attestation.<sup>3</sup>

### § 21. Describing the parties.

It is imperative that the writ of error shall contain the full names; and not merely the firm name of all the parties to the record.<sup>4</sup>

### § 22. Amendment of writ of error.

It is discretionary with the court to permit or deny an amendment of the writ of error.<sup>5</sup>

<sup>1</sup> U. S. v. Alamo—Lumber Co., 202 Fed. 700, 121 C. C. A. 162.

<sup>2</sup> U. S. v. Lombardo, 228 Fed. 989; Mutual Life Ins. Co. v. Phinney, 76 Fed. 617, 22 C. C. A. 425.

<sup>3</sup> Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506, 7 Sup. Ct. Rep. 317; Bondurant v. Watson, 103 U. S. 278; Smith v. Currie, 230 Fed. 803, 26 L. Ed. 447.

<sup>4</sup> The Bylands, 231 Fed. 101; Rumiger v. Puget S. El. Co. 220 Fed. 419; Godbe v. Tootle, 154 U. S. 576, 14 Sup. Ct. Rep. 1167, 19 L. Ed. 831; Estes v. Trabue, 128 U. S. 225, 9 Sup. Ct. Rep. 58, 32 L. Ed. 437; Gumble v. Pitkin 113 U. S. 545, 5 Sup. Ct. Rep. 616, 28 L. Ed. 1128; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; Wilson v. Life & F. Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; Miller v. McKenzie, 10 Wall. 582, 19 L. Ed. 1043; Deneale v. Archer, 8 Pet. 526, 8 L. Ed. 1032; Smyth v. Strader, 12 How. 327, 13 L. Ed. 1008.

<sup>5</sup> Rumiger v. Puget S. El. Co., supra; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436.

A writ of error may be corrected by inserting the name of a party omitted by mistake.<sup>1</sup>

But a defect in allowing or issuing the writ is amendable.<sup>2</sup>

**§ 23. Assignment of errors—Necessity for assignment of error.**

"4. When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."<sup>3</sup>

Section 997 of the Rev. Stat. of U. S. provides that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, and assignments of errors, and a prayer for reversal, with a citation to the adverse party."

Where no assignment of errors has been annexed to or returned with the writ, as required by Section 997 of the Revised Statutes, the writ of error will be dismissed.<sup>4</sup>

The court is not called upon to consider errors argued but not assigned.<sup>5</sup>

An assignment of error cannot enlarge the Federal question as made by the record.<sup>6</sup>

A Federal appellate tribunal will not review a case where

<sup>1</sup> Churchfield El. Co. v. Titus, 226 Fed. 574; Gilbert v. Hopkins, 198 Fed. 849, 118 C. C. A. 491.

<sup>2</sup> Miller v. Texas, 153 U. S. 537, 38 L. Ed. 813, 14 Sup. Ct. Rep. 874; Texas & R. R. Co. v. Kirk, 111 U. S. 486, 4 Sup. Ct. Rep. 500, 28 L. Ed. 481; Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538; Cotter v. Alabama, R. R. Co., 61 Fed. 747, 10 C. C. A., 35.

<sup>3</sup> § 4 of Rule 21 of U. S. Supreme Court. The rule has been followed. Wood v. Wilbert, 226 U. S. 384, 33 Sup. Ct. Ref. 125, 57 L. Ed. 265.

<sup>4</sup> Bernard v. Lea, 210 Fed. 583; Micas. v. Williams, 104 U. S. 556, 26 L. Ed. 842.

<sup>5</sup> Paraiso v. United States, 207 U. S. 368, 28 Sup. Ct. Rep. 127, 52 L. Ed. 249; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. Rep. 693, 36 L. Ed. 450.

<sup>6</sup> Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 35 Sup. Ct. Rep. 21, 59 L. Ed. 127.

there is no assignment of errors accompanying the transcript of the record.<sup>1</sup>

An appeal cannot be allowed without assignment of errors.<sup>2</sup>

It is too late to raise a point if not covered by an assignment of error,<sup>3</sup> and review is limited to errors assigned.<sup>4</sup>

#### § 24. Prayer for reversal.

The assignment of errors accompanying same must contain a prayer for reversal of the judgment or decree appealed from. If not specifically prayed, it may sometimes be inferred from the context of the petitions.<sup>5</sup>

#### § 25. Form of assignment of errors.

(a) In a recent case the Supreme Court of the U. S. deemed it proper to repeat the warning given in *Phillips & Colby Construction Co. v. Seymour* (91 U. S. 643, 23 L. Ed. 342), that the practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring assignments. It points to nothing and thwarts the purpose of the rule, and which was intended to present to the Court a clear and concise statement of material points on which plaintiff intends to rely.<sup>6</sup>

#### § 26. Assignments held bad.

Rulings as to which exception was not taken at the time, or as to matters not set out in the assignment of error and requiring a search through the record to determine the alleged error will not be considered on review.<sup>7</sup>

<sup>1</sup> *Bernard v. Lea*, supra; *Stevenson v. Barbour*, 140 U. S. 48, 35 L. Ed. 338, 11 Sup. Ct. Rep. 690.

<sup>2</sup> *Baxter v. Beval Phillips*, 219 Fed. 309; *Long v. Marwell*, 59 Fed. 948, 8 C. C. A. 410.

<sup>3</sup> *Connell Bros. Co. v. Diederichsen & Co.*, 213 Fed. 737, 130 C. C. A. 251.

<sup>4</sup> *Arnold v. Harrigan*, 238 Fed. 39.

<sup>5</sup> U. S. Motion P. Co., 230 Fed. 541; Sect. 997 of Rev. St. of U. S., Rule 8, § 1 of U. S. Supreme Court; Rule 14 of U. S. Court of Appeals 2d circuit; *Springfield Safe Deposit Co. v. City of Attica*, 56 U. S. App. 330, 85 Fed. 387.

<sup>6</sup> *Central Vermont R. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. Rep. 865, 59 L. Ed. 1433.

<sup>7</sup> *Matheson v. United States*, 227 U. S. 541, 33 Sup. Ct. Rep. 355, 57 L. Ed. 631.



An assignment of error is bad, if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented.<sup>1</sup>

General assignments of errors will not be entertained.<sup>2</sup>

Unless the assignment of error is in accordance with Rule 11 of the Circuit Court of Appeals, which requires each error asserted and intended to be urged to be set out separately and particularly, it is not sufficient.<sup>3</sup>

Assignments of error, while required in cases brought into a reviewing court by appeal as well as in cases brought up by writ of error, are not good unless they are clearly directed to the rulings of the court.<sup>4</sup>

Assignment of errors relating to the admission or rejection of evidence not setting out in *totalis verbis* the evidence complained of will not be considered.<sup>5</sup>

The U. S. Supreme Court will not consider a general exception to the charge of the court as a whole.<sup>6</sup>

<sup>1</sup> Bernard v. Lea, *supra*; Fountain v. Detroit M. T. & S. L. Ry., 210 Fed. 982; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 63 Fed. 891 (C. C. A. 7th Cir., 12 C. C. A. 350); Thompkins v. Missouri K. & T. Ry., 211 Fed. 391.

<sup>2</sup> Pacific Teleg. & Tel. Co. v. Hoffman, 208 Fed. 221; Bogk v. Gassert, 149 U. S. 17, 37 L. Ed. 631, 13 Sup. Ct. Rep. 738; National Bank of Commerce v. First National Bank, 61 Fed. 809; Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401; Randolph v. Allen, 73 Fed. 23, 19 C. C. A. 353.

<sup>3</sup> Thompkins v. Missouri K. & T. Ry. Co., 211 Fed. 391; U. S. v. Hammond, 226 Fed. 849; Natl. Bk of Comm. of Kansas City, Mo., v. First Natl. Bank of K. C., Kansas, et al., 61 Fed. 809.

<sup>4</sup> H. E. Winterton Gum Co. v. Autosales G. & E. Co., 211 Fed. 612; Randolph v. Allen, et al., 73 Fed. 23, 19 C. C. A. 353.

<sup>5</sup> Cisco v. Looper, 236 Fed. 336 (C. C. A. 8th Cir.), Winterton Gum Co. v. Autosales Co., 211 Fed. 612, 128 C. C. A. 212; National Bank of Commerce of Kansas City v. First National Bank, 61 Fed. 809 (C. C. A. 8th Cir.); Grand Trunk R. R. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 488, 12 Sup. Ct. Rep. 679; Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 35 L. Ed. 961, 12 Sup. Ct. Rep. 181.

<sup>6</sup> Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 35 L. Ed. 961, 12 Sup. Ct. Rep. 181; Lucas v. Brooks, 85 U. S., 18 Wall. 436, 21 L. Ed. 779; Burton v. West Jersey Ferry Co., 114 U. S. 474, 29 L. Ed. 215, 5 Sup. Ct. Rep. 960; Pacific T. & T. Co. v. Hoffman, 208 Fed. 221.

An assignment of error grouping together a series of instructions presented to the trial court and constituting a single request cannot be sustained.<sup>1</sup>

Assignments of error, where the decree appealed from is one confirming a Master's report, should not be in the form of elaborate arguments in support of the contention that the court erred in sustaining the Master's findings, but should be clearly directed to the rulings of the court.<sup>2</sup>

The law is well settled in the Federal Courts that an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon.<sup>3</sup>

### § 27. Assignments held good.

It is ordinarily sufficient if an assignment of error is filed in accordance with the requirements of § 4, Rule 21 of the U. S. Supreme Court.<sup>4</sup>

An assignment of error stating in general terms that the Court erred in rendering judgment on the pleadings was held sufficient.<sup>5</sup>

An assignment that the Court erred in sustaining demurrer held sufficient.<sup>6</sup>

<sup>1</sup> *Buckeye Powder Co. v. E. I. Dupont Powder Co.*, 223 Fed. 881; *Bogk v. Gasert*, 149 U. S. 17, 37 L. Ed. 631, 13 Sup. Ct. Rep. 738; *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447, 4 Sup. Ct. Rep. 466; *Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848; *Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797; *Harvey v. Tyler*, 69 U. S., 2 Wall. 328, 17 L. Ed. 871; *U. S. v. Hammond*, 226 Fed. 849.

<sup>2</sup> *Buckeye Powder Co. v. E. I. Dupont Powder Co.*, *supra*; *Randolph v. Allen*, et al., 73 Fed. 23 (C. C. A. 5th Cir., 19 C. C. A. 353).

<sup>3</sup> *Continental Public Works v. Stein* (C. C. A. 2d Cir.), 232 Fed. 559; *Ansbro v. United States*, 159 U. S. 695, 40 L. Ed. 310, 16 Sup. Ct. Rep. 187; *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608.

<sup>4</sup> *Barnard v. Lea*, 210 Fed. 583; *School Dist. of Ackley v. Hall*, 106 U. S. 428, 429, 1 Sup. Ct. Rep. 417, 27 L. Ed. 237.

<sup>5</sup> *Klink v. Chicago R. I. & P. R. Co.*, 219 F. 457.

<sup>6</sup> *Mitsui v. St. Paul F. & M. Ins. Co.*, 202 Fed. 26; *Klink v. Chicago R. I. & P. R. Co.*, 219 Fed. 457.

**§ 28. Effect of plain error.**

The appellate tribunal may notice a plain unassigned error appearing on the record.<sup>1</sup>

**§ 29. Cross-assignments of error not permitted. Cross-appeals.**

The practice prevailing in the State Courts for assignment of cross-errors on the same record is not available in the Federal Courts.<sup>2</sup>

**§ 30. Where both parties appeal to the Supreme Court, one record sufficient.**

Sec. 1013 of the Rev. Stat. of U. S. is as follows:

“Where appeal is duly taken by both parties from the judgment or decree of a Circuit or District Court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases.”

**§ 31. Bond—The Statute.**

Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by the direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.<sup>3</sup>

<sup>1</sup> Mound Coal Co. v. Jeffrey Mfg. Co. (C. C. A. 8th Cir.), 233 Fed. 913; Teal v. Walker, 111 U. S. 242, 28 L. Ed. 415, 4 Sup. Ct. Rep. 420; Lehnen v. Dickson, 148 U. S. 71, 37 L. Ed. 373, 13 Sup. Ct. Rep. 481; U. S. v. Tennessee & C. R. Co., 176 U. S. 242, 20 Sup. Ct. Rep. 370, 44 L. Ed. 452; Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121; White v. United States, 202 Fed. 501, 121 C. C. A. 33.

<sup>2</sup> Daniels v. Portland G. M. Co., et al., 202 Fed. 637; Ætna Indemnity Co. v. J. R. Crowe Mining Co., 154 Fed. 567, 83 C. C. A. 431; Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380.

<sup>3</sup> Section 1000 Rev. Statuts.

**§ 32. In criminal cases.**

This section does not apply in criminal cases in which a defendant may sue out a writ of error without security,<sup>1</sup> but, where a judgment for costs was entered against the defendants in a criminal case, he cannot obtain a writ of error without giving security for costs.<sup>2</sup>

**§ 33. Filing the bond.**

While a bond is necessary to perfect an appeal or writ of error, it is not jurisdictional, and may be waived by the parties.<sup>3</sup>

The bond may be filed by leave in the appellate tribunal.<sup>4</sup>

**§ 34. Who must sign bond.**

It is not essential that all appellants should sign the appeal bond.<sup>5</sup>

And the stay will be operative only as against those who gave the bond.<sup>6</sup>

Where an appeal is taken only from part of a judgment and such part is of such nature that it does not affect other defendants, the defendant without joining the other defendants may prosecute a separate appeal.<sup>7</sup>

<sup>1</sup> *Andrews v. U. S.*, 224 Fed. 418; *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. Rep. 735, 35 L. Ed. 409. The United States is not required to give bond. R. S. § 1001.

<sup>2</sup> *American Surety Co. v. U. S.* 239 Fed. 68 (C. C. A. 5th Cir.).

<sup>3</sup> *Shepherd v. Pepper*, 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. Rep. 438; *Brown v. McConnell*, 124 U. S. 492, 31 L. Ed. 495, *The Bylands*, 231 Fed. 101; 8 Sup. Ct. Rep. 559; *Steward v. Masterson*, 124 U. S. 493, 8 Sup. Ct. Rep. 561, 31 L. Ed. 507; *Barnard v. Lea*, 210 Fed. 589.

<sup>4</sup> *Shepherd v. Pepper* 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. Rep. 438; *Brown v. McConnell*, 124 U. S. 492, 31 L. Ed. 495, 8 Sup. Ct. Rep. 559; *Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97.

<sup>5</sup> *Scruggs v. Memphis & C. R. R. Co.*, 104 U. S. 26 L. Ed. 741; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Illinois Surety Co. v. U. S.*, 226 Fed. 665.

<sup>6</sup> *Higbee v. Chadwick*, 220 Fed. 873; *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529.

<sup>7</sup> *Alsop v. Conway*, 188 Fed. 568; *Higbee v. Chadwick*, 220 Fed. 873; *Orleans-Kenner Elec. Co. v. Dunbar*, 218 Fed. 344.

**§ 35. Who may approve.**

The judge allowing the appeal may approve the bond in chambers.<sup>1</sup>

The clerk of the court has no power to approve the bond, even though the court by an order authorizes him so to do.<sup>2</sup>

While a clerk cannot approve a bond, the defect may be remedied by refileing a proper bond duly approved by the judge.<sup>3</sup>

It is no ground for dismissal that the bond is defective and the Court on application will permit the filing of a corrected bond.<sup>4</sup>

**§ 36. To whom made.**

The bond must run to the name of the opposite party or the appeal or writ of error will be dismissed.<sup>5</sup>

Where the judgment is several, each defendant may file his separate bond.<sup>6</sup>

**§ 37. Time for filing bond.**

The bond must be filed within a reasonable time or the writ of error will be dismissed.<sup>7</sup>

When no appeal bond has been filed for four years from the date of the allowance of the appeal, it will be dismissed on motion.<sup>8</sup>

**§ 38. Citation.**

(a) The Statute provides:

<sup>1</sup> *Gladden v. Garbert*, 219 Fed. 855; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511.

<sup>2</sup> *Haskins v. St. Louis, etc., R. R. Co.*, 109 U. S. 106, 3 Sup. Ct. Rep. 72, 27 L. Ed. 873; *O'Reilly v. Edrington*, 96 U. S. 726, 24 L. Ed. 659.

<sup>3</sup> *Chicago Dollar Directory Co. v. Chicago Directory*, 65 Fed. 463, 13 C. C. A. 8; *Freeman v. U. S.*, 227 Fed. 732.

<sup>4</sup> *Seward v. Comeau*, 102 U. S. 161, 26 L. Ed. 86.

<sup>5</sup> *The Bylands*, 231 Fed. 101; *Davenport v. Fletcher*, 16 How. 142, 14 L. Ed. 879; *Bigler v. Waller*, 12 Wall. 142, 20 L. Ed. 260.

<sup>6</sup> *Orleans-Kenner Elec. Co. v. Dunbar*, 218 Fed. 344; *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529.

<sup>7</sup> *Rhame v. Southern & C. Co.*, 230 Fed. 403; *Beardsley v. Arkansas & Louisiana Ry. Co.*, 158 U. S. 123, 39 L. Ed. 919, 15 Sup. Ct. Rep. 786; *Corcoran v. Kostrometinoff*, 91 C. C. A. 619, 164 Fed. 685.

<sup>8</sup> *Beardsley v. Arkansas & Louisiana R. R. Co.*, 158 U. S. 123, 39 L. Ed. 919, 15 Sup. Ct. Rep. 786.

"When the writ is issued by the Supreme Court to a District Court, the citation shall be signed by a judge of such District Court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a State Court, the citation shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice." (Rev. Stat. U. S. Sec. 999.)

Citation can only be issued by the judge who allowed the appeal or writ of error.<sup>1</sup>

The citation must be signed by the judge allowing the appeal or writ of error and made returnable not less than thirty (30) days.

(b) Section 5 of Rule 8 of the Supreme Court of the United States provides:

"All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days."

### § 39. Time of return of citation.

Thirty (30) days is the limit for making return of the citation in most circuits. In the Fourth Circuit forty (40) days is allowed.

A citation making an appeal or writ of error returnable "within thirty days from the date hereof" is a sufficient compliance with the rule.<sup>2</sup>

### § 40. Appellate Court may issue citation.

Where a citation is not issued in the first instance, the Appellate Court at its discretion may make an order for the issuance of a citation later.<sup>3</sup>

<sup>1</sup> Insurance Co. v. Mordecai, 21 How. 195, 16 L. Ed. 94; Browning v. Boswell, 209 Fed. 778.

<sup>2</sup> Seaboard Air-Line R. R. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. Rep. 635, 58 L. Ed. 1062.

<sup>3</sup> Dodge v. Knowles, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 144; Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 6 Sup. Ct. 74, 29 L. Ed. 432; Jacobs v.

**§ 41. When lack of citation is not jurisdictional.**

The fact that the citation was not issued until after thirty days after the allowance of the appeal or writ of error will not oust the appellate tribunal of jurisdiction, provided service was obtained.<sup>1</sup>

**§ 42. Parties to citation.**

All parties to the suit directly interested in the result of the appeal must be cited.<sup>2</sup>

**§ 43. When citation unnecessary.**

When notice of appeal is given and the appeal is allowed in open court, the issuance of a citation is unnecessary.<sup>3</sup>

**§ 44. Necessary if bond filed after term.**

But this rule holds good only if the appellant has perfected his appeal and given the necessary bond during the term; if not so perfected, a citation is necessary. *Browning v. Boswell*, supra.<sup>4</sup>

**§ 45. Necessary if appeal taken after term.**

A citation is imperative if the appeal is allowed after term, although it may have been allowed upon notice in open court *Browning v. Boswell*, supra.<sup>5</sup>

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George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 Sup. Ct. 626, 39 L. Ed. 725; *Browning v. Boswell*, 209 Fed. 788.

<sup>1</sup> *Berliner Gramophone Co. v. Seaman* (C. C. A.), 108 Fed. 714.

<sup>2</sup> *Illinois Trust & Savings Bank v. Kilbourne*, 22 C. C. A. 599, 76 Fed. 883; *New York Assets Realization v. McKinnon*, 209 Fed. 791 (C. C. A. 2d Cir.).

<sup>3</sup> *Jacobs v. George*, 150 U. S. 416, 37 L. Ed. 1127, 14 Sup. Ct. Rep. 159; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144, 5 Sup. Ct. Rep. 1197; *Richardson v. Green*, 130 U. S. 114, 32 L. Ed. 875, 9 Sup. Ct. Rep. 443; *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 524, 30 C. C. A. 235; *Columbus Chain Co. v. Standard Chain Co.*, 145 Fed. 186, 76 C. C. A. 164; *Browning v. Boswell*, 209 Fed. 788.

<sup>4</sup> *Brown v. McConnell*, 124 U. S. 491, 41 L. Ed. 496, 8 Sup. Ct. Rep. 559; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. Ed. 582, 6 Sup. Ct. Rep. 319; *Radford v. Folsom*, 123 U. S. 727, 31 L. Ed. 293, 8 Sup. Ct. Rep. 334; *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127, 14 Sup. Ct. Rep. 159.

<sup>5</sup> *Jacobs v. George*, 150 U. S. 416, 37 L. Ed. 1127, 14 Sup. Ct. Rep. 159; *Peace Phosphate Co. v. Edwards*, 70 Fed. 728.

**§ 46. Imperative on writ of error.**

A citation is always required where the mode of review is by writ of error.<sup>1</sup>

Notice of a writ of error, given in open court, at the same term the judgment is entered, is not equivalent to the citation required by Section 999 of the Rev. Statutes of the U. S. In this respect writs of error differ from appeals taken in open court.<sup>2</sup>

**§ 47. Waiver of objection to insufficiency.**

The point of insufficiency of the citation is waived by acceptance of service of same.<sup>3</sup>

By filing a general appearance citation is waived.<sup>4</sup>

**§ 48. Service on attorney sufficient.**

Service of citation upon the attorney for the defendant in error in the case below is sufficient.<sup>5</sup>

Service of the citation by mailing is invalid.<sup>6</sup>

**§ 49. Supersedeas—Time for application—60 days.**

(a) The Statute provides:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of

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<sup>1</sup> U. S. v. Phillips, 121 U. S. 254, 7 Sup. Ct. Rep. 874, 30 L. Ed. 914; Kitchin v. Randall, 93 U. S. 86, 23 L. Ed. 810; Roberts v. Kendrick, 211 Fed. 970.

<sup>2</sup> U. S. v. Phillips, 121 U. S. 254, 7 Sup. Ct. Rep. 874, 30 L. Ed. 914; Kitchin v. Randall, 93 U. S. 86, 23 L. Ed. 810; Browning v. Boswell, 209 Fed. 788.

<sup>3</sup> Goodwin v. Fox, 120 U. S. 775, 7 Sup. Ct. Rep. 779, 30 L. Ed. 815; Bigler v. Wallace, 12 Wall. 142, 20 L. Ed. 260; Smith v. Currie, 230 Fed. 803.

<sup>4</sup> Villa Bolas v. United States, 6 How. 81, 12 L. Ed. 352; Tripp v. Santa Rosa Street Ry. Co., 144 U. S. 126, 12 Sup. Ct. Rep. 655, 36 L. Ed. 373; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641; Richardson v. Green, 130 U. S. 115, 9 Sup. Ct. Rep. 443, 32 L. Ed. 876; Lowitz v. Kimmerle, 221 Fed. 857.

<sup>5</sup> Smith v. Currie, 230 Fed. 803; Bigler v. Wallace, 12 Wall. 142, 20 L. Ed. 260; United States v. Curry, 6 How. 106, 12 L. Ed. 363; Bacon v. Hart, 1 Black 38, 17 L. Ed. 52.

<sup>6</sup> Tripp v. Santa Rosa Street Ry. Co., 144 U. S. 126, 12 Sup. Ct. Rep. 655, 36 L. Ed. 373.



error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days."<sup>2</sup>

(b) Rule 29 of the Supreme Court of the United States provides:

"Supersedeas bonds in the district courts and Circuit Courts of Appeals must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."<sup>3</sup>

### § 50. Prerequisites for supersedeas.

Before an Appellate Court may issue a writ of supersedeas, it must appear that the writ of error and citation had actually been issued and served.<sup>3</sup>

### § 51. Lodgment of writ of error.

The allowance of the writ of error and the lodgment of the same with the clerk of the court below, together with a copy of same for the adverse party within sixty days from the date of judgment, are essential prerequisites to the granting of a supersedeas.<sup>4</sup>

### § 52. A matter of right—function of court.

Under Section 1007 of the Rev. Stat. of the U. S., a super-

<sup>2</sup> R. S. § 1007, as amended 1875. U. S. Comp. Stat. 1901, p. 714.

<sup>3</sup> Rule XIII. of the U. S. Circuit Court of Appeals for the 2d Circuit is identical with above Rule 29.

<sup>3</sup> *Roberts v. Kendrick*, 211 Fed. 970, S. C. 211 Fed. 1024; *Ex parte Ralston*, 119 U. S. 615, 7 Sup. Ct. Rep. 317, 30 L. Ed. 506; *Smith v. Currie*, 230 Fed. 803.

<sup>4</sup> *Title Guarantee & Trust Co. v. United States*, 222 U. S. 401, 32 Sup. Ct. Rep. 168, 56 L. Ed. 248; *Railroad Co. v. Harris*, 7 Wall. 574, 19 L. Ed. 100; *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857.

sedeas is a matter of right and the duty of the judge is limited in passing upon the amount and character of the security.<sup>1</sup>

### § 53. Requiring better security.

The court has power, upon application, to require a better bond or increase the amount of the bond.<sup>2</sup>

### § 54. Supersedeas and bail in criminal cases.

In criminal cases a defendant is entitled to a supersedeas and bail as a matter of right.<sup>3</sup> The mere lodgment of the writ of error with the clerk within sixty (60) days operates as a supersedus.<sup>4</sup>

Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under Section 238, the District Court, or any judge thereof, shall have power, *after the citation is served*, to admit the accused to bail in such amount as may be fixed.<sup>5</sup>

In capital cases the writ of error operates as a supersedeas.<sup>6</sup>

### § 55. Stay of death penalty—The Statute.

“That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme

<sup>1</sup> Randall Co. v. Foglesong M. Co., 200 Fed. 741; *McCourt v. Singer Bigger*, 150 Fed. 102 (C. C. A.).

<sup>2</sup> *Williams v. Claffin*, 103 U. S. 753, 26 L. Ed. 606.

<sup>3</sup> *McKnight v. U. S.*, 51 C. C. A., 285; *In re Classens*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; *Hudson v. Parker*, *supra*.

<sup>4</sup> *Gould v. U. S.*, 205 Fed. 883; *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. Rep. 450, 39 L. Ed. 424; *Hardesty v. United States (C. C. A.)*, 184 Fed. 269.

<sup>5</sup> Par. 2 of Supreme Court Rule 36; Sect. 2 of Rule 3, C. C. A., 2 Cir.; Rule 34 as amended, C. C. A., 2 Cir.

<sup>6</sup> Paragraph 6, Act of Feb. 6, 1889, 25 St. at Large 656.

Court of the United States to receive, file, and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." (Sect. —, 25 Stat. L. 656.)

Section 1040 of the Rev. St. of U. S. also provides:

"Whenever a judgment of death is rendered in any court of the United States and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct."

### § 56. Time for filing.

The bond for supersedeas may be filed at any time within sixty days.<sup>1</sup>

### § 57. Effect of perfecting appeal or writ of error. Transfer of jurisdiction.

It is well established that the perfecting of an appeal or writ of error transfers the cause to the appellate tribunal where it remains until it is remitted to the trial court by the sending down of the mandate.<sup>2</sup>

<sup>1</sup> In re Claasen, 140 U. S. 200, 11 Sup. Ct. Rep. 735, 35 L. Ed. 409; Roberts v. Kendrick, 211 Fed. 1024; same case, 211 Fed. 970.

<sup>2</sup> Credit Co. v. Ry. Co., 128 U. S. 258, 9 Sup. Ct. Rep. 107, 32 L. Ed. 448; Omaha Elec. R. Co. v. City of Omaha, 216 Fed. 850; Aspen Smelting Co. v. Bil-

Jurisdiction is transferred to the Supreme Court and the jurisdiction of the lower court is gone the moment the bond is filed and approved.<sup>1</sup>

As soon as the bond is approved and filed the jurisdiction of the trial court is gone and the jurisdiction of the appellate tribunal attaches.<sup>2</sup>

### § 58. Proceedings in the lower court.

While the cases are not fully in accord as to the proper procedure to be followed when an application is made for a rehearing on account of newly discovered evidence, it is apparent from the decisions that if a decree has been entered in the lower courts, and an appeal has been taken therefrom to the Circuit Court of Appeals, so that the Appellate Court has jurisdiction, the proper proceeding is for the petitioner to file a petition duly verified and addressed to the Appellate Court, and praying for leave to file in the lower court a supplemental bill in the nature of a bill of review.<sup>3</sup>

### § 59. A matter of right.

An appeal may be taken or writ of error prosecuted as a matter of right.<sup>4</sup>

### § 60. Setting aside appeal.

The party obtaining an appeal may during the term move to set aside the order allowing the appeal.<sup>5</sup>

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lings, 150 U. S. 31, 14 Sup. Ct. Rep. 4, 37 L. Ed. 986; *Lockman v. Lang*, 132 Fed. 1, 65, C. C. A. 621.

<sup>1</sup> *Kendrick v. Roberts*, 214 Fed. 268; *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025.

<sup>2</sup> *U. S. v. Mayer*, 235 U. S. 55, 35 Sup. Ct. Rep. 16, 59 L. Ed. 129; *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. Rep. 501, 54 L. Ed. 762; *Ex parte Equitable Trust Co.*, 231 Fed. 571, C. C. A. 571.

<sup>3</sup> *Sheeler v. Alexander*, 211 Fed. 544; *In re Gamewell*, 73 Fed. 908, 20 C. C. A. 111; *Westinghouse Co. v. Stanley*, 138 Fed. 823, 71 C. C. A. 189; *Bliss v. Reed*, 106 Fed. 318, 45 C. C. A. 304; *Boston Railway Co. v. Bemis Co.*, 98 Fed. 121, 38 C. C. A. 661.

<sup>4</sup> *Randall v. Foglesong, M. Co.*, 200 Fed. 741; *McCourt v. Singer Bigger*, 150 Fed. 102, 80 C. C. A. 56; *United States v. Curry*, 6 How. 106, 12 L. Ed. 363.

<sup>5</sup> *Storey v. Storey*, 221 Fed. 262; *Goddard v. Ordway*, 101 U. S. 745, 25 L. Ed.

But the rule does not apply to cases where the order sought to be amended or vacated is not a final order or judgment. An interlocutory order may be set aside at any time before the close of the term at which *final decree* is entered.<sup>1</sup>

### § 61. Second appeal—when allowed.

Second appeal may be taken or writ of error sued out within statutory time if dismissed for irregularity.<sup>2</sup>

So if the record is not filed during the return term, the writ expires. The plaintiff in error may have a second writ within the time limited for taking an appeal or error.<sup>3</sup>

Where a party mistakes his remedy and sues out a writ of error instead of an appeal, he may dismiss his writ of error and procure an order of appeal, provided the statutory time for the appeal has not elapsed. On such appeal the Supreme Court on motion duly made will permit the refile of the original transcript of the record on the new appeal.<sup>4</sup>

### § 62. Second appeal subsequent to mandate.

A second appeal from a judgment or decree entered after remandment brings up for review only the proceedings subsequent to mandate.<sup>5</sup>

A District Court cannot do otherwise than carry out the mandate from the Court of Appeals or Supreme Court and cannot

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1040; *Cornue v. Ingersoll*, 176 Fed. 194, 200; *Aspen M. & S. Co. v. Billings*, 150 U. S. 31, 35, 14 Sup. Ct. Rep. 4, 37 L. Ed. 986; *Nelson v. Meehan*, 155 Fed. 1, 4.

<sup>1</sup> *Storey v. Storey*, 221 Fed. 262; *Southern Pacific Co. v. Kelley*, 187 Fed. 937.

<sup>2</sup> *Freeman v. U. S.*, 227 Fed. 731; *Yeaton v. Lennox*, 8 Peters 123, 8 L. Ed. 889; *The Virginia v. West*, 19 How. 182, 15 L. Ed. 594; *U. S. v. Pacheco*, 20 How. 261, 15 L. Ed. 820; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Deneale v. Archer*, 8 Peters 526, 8 L. Ed. 1032.

<sup>3</sup> *Evans v. Bank*, 134 U. S. 330, 331, 10 Sup. Ct. 493, 33 L. Ed. 917; *Edmonson v. Bloomshire*, 7 Wall. 306, 309, 19 L. Ed. 91; *Aspen Mining Co. v. Billings*, 150 U. S. 35, 14 Sup. Ct. 4, 37 L. Ed. 986; *Small v. Northern Pacific R. R. Co.*, 134 U. S. 514, 515, 10 Sup. Ct. 614, 33 L. Ed. 1006; *Robertson Banking Co. v. Chamberlain*, 228 Fed. 500.

<sup>4</sup> *Bernard v. Lea*, 210 Fed. 583; *Williams v. Savings Bank*, 141 U. S. 249, 11 Sup. Ct. Rep. 1005, 35 L. Ed. 740; but see Act of Sept. 6, 1916, Chap. II., § 7.

<sup>5</sup> *The Steam Dredge A.*, 229 Fed. 682; *Hinckley v. Norton*, 103 U. S. 764, 26 L. Ed. 458.

refuse to do so on the ground of want of jurisdiction in itself or in the Appellate Court.<sup>1</sup>

There is a long line of decisions to the effect, generally speaking, that when a case in equity has been carried to an appellate court, followed by a mandate from such court to the trial court, the trial court has no discretion other than to observe and in most instances literally follow the terms of the mandate as to further proceedings.<sup>2</sup>

Where decree is entered in pursuance to mandate, an appeal will not be entertained and it will be dismissed.<sup>3</sup>

### § 63. Special procedure in admiralty—Taking the appeal.

“An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court and serving on the proctor of the adverse party, a notice, signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of. The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.”<sup>4</sup>

Admiralty cases are taken by appeal only.<sup>5</sup>

The appeal may be limited to specific points.

The third admiralty rule of the U. S. Court of Appeals is as follows:

“The appellant may also, at this option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.”

In many particulars the practice generally prevailing in the

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<sup>1</sup> *Brown v. Alton Water Co.*, 222 U. S. 325, 32 Sup. Ct. Rep. 156, 56 L. Ed. 221.

<sup>2</sup> *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 49 L. Ed. 414; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *St. Louis & S. R. R. Co. v. Barker*, 210 Fed. 902.

<sup>3</sup> *Brown v. Alton Water Co.*, 222 U. S. 325, 32 Sup. Ct. Rep. 156, 56 L. Ed. 221; *Humphrey v. Baker*, 103 U. S. 736, 26 L. Ed. 456.

<sup>4</sup> Rule 1 in admiralty, C. C. A., 2nd Circuit.

<sup>5</sup> *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; *The Protector*, 11 Wall 82, 20 L. Ed. 47.

U. S. Court of Appeals is also applicable in admiralty cases. By an express rule it is ordained:

"The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz: Rules 3, 4, 5, 6, 7, 9, 11, 12; Section 4 of Rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22; amended Rule 23; Section 5 of Rule 24; Rules 25, 26, 27, 28, 29; Section 4 of Rule 30; Rules 31, 32, 34, and 36.

"In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the District Court of the district in which the cause was decided being in force at the time, not being inconsistent with these rules, will be adopted so far as may seem proper."

### § 64. Supersedeas in admiralty.

If the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.<sup>1</sup>

The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.<sup>2</sup>

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

<sup>1</sup> § 2 Admiralty Rule II., 2d Circuit.

<sup>2</sup> 3d section, Admiralty Rule II., 2d Circuit, adopted October 5, 1892.

## CHAPTER XVI

## Federal Appellate Procedure

## II. THE RECORD

- | Sec.   | Sec.   |
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| 2. Record cannot be impeached.                               | 11. Practice same in U. S. Courts of<br>Appeal.  |
| 3. Duplications in record not permitted.                     | 12. Record must at least contain com-<br>mon law requisites.                               |
| 4. "Common Law Record"—What it<br>consists of.               | 13. Parties may agree what record should<br>contain.                                       |
| 5. Papers in the record—How incor-<br>porated and certified. | 14. Time for return—30 days—Exten-<br>sion.  |
| 6. Opinions of the court are part of the<br>record.          | 15. Record must be complete. Refer-<br>ence to other record not permitted.                 |
| 7. The record—How made and re-<br>turned—The Statute.        |  |
| 8. Diligence required of plaintiff in error.                 |  |
| 9. The Rules of Court.                                       |  |

### § 1. What is a record—Definition.

A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly matter of record can be made such by inserting therein.<sup>1</sup>

### § 2. Record cannot be impeached.

A record imports absolute verity. Affidavits cannot contradict the recital of the record. Affidavits must be incorporated in the bill of exceptions.<sup>2</sup>

### § 3. Duplications in record not permitted.

The Federal reviewing courts have frequently condemned the practice of duplicating papers in the record and, while it is not

<sup>1</sup> *Eldorado Coal & Mining Co. v. Mariotti*, 215 Fed. 51; *U. S. v. Taylor*, 147 U. S. 695, 13 Sup. Ct. Rep. 479, 37 L. Ed. 335.

<sup>2</sup> *Johnson v. The United States*, 225 U. S. 411, 56 L. Ed. 1144, 32 Sup. Ct. Rep. 750; *Stewart v. Wyoming Co.*, 128 U. S. 383, 9 Sup. Ct. Rep. 101, 32 L. Ed. 439; *Evans v. Stettinson*, 149 U. S. 605, 13 Sup. Ct. Rep. 931, 37 L. Ed. 866; *Baltimore & Potomac R. R. Co. v. Trustees*, 91 U. S. 127, 23 L. Ed. 260.



easy in all cases to prescribe what the record shall contain or what shall be excluded, the rules and decisions of the court governing the matter of preparation of record offer appropriate guide in cases at law or in equity.<sup>1</sup>

**§ 4. "Common law record"—What it consists of.**

The declaration, bill, answer, and other pleadings, together with the judgment or decree and all orders entered in the case constitute what is considered as the record.<sup>2</sup>

**§ 5. Papers in the record—How incorporated and certified.**

In cases at common law the course of the appellate tribunal has been uniform not to consider any paper as a part of the record which is not made so by the pleadings or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction according to the course of common law. The appellate court cannot know what evidence was given to the jury, unless it is spread on the record in a proper legal manner. The unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognizance of the court.<sup>3</sup>

**§ 6. Opinions of the court are part of the record.**

The early rule that opinions of the court are not part of the record is no longer in force. The rule requires that opinions of

<sup>1</sup> *Manhattan L. I. Co. v. Cohen*, 234 U. S. 124, 34 Sup. Ct. Rep. 874, 58 L. Ed. 1245; *Union Pacific R. R. Co. v. Stewart*, 95 U. S. 279, 285, 24 L. Ed. 431; *Ball Fastener Co. v. Kreutzer*, 150 U. S. 118, 14 Sup. Ct. Rep. 48, 37 L. Ed. 1021; *Redfield v. Parks*, 130 U. S. 625, 9 Sup. Ct. Rep. 642, 32 L. Ed. 1054; *Nashua R. Corporation v. Boston R. Corporation*, 61 Fed. 244, 21 U. S. App. 50; *U. S. Sugar Refining Co. v. Providence*, 52 Fed. 382, 18 U. S. Appeals, 603.

<sup>2</sup> *Eldorado C. & M. Co. v. Mariotti*, 215 Fed. 51; *Whiting, et al., the Bank of the United States*, 13 Peters 6, 10 L. Ed. 33; see also § 6 et seq. of this chapter. For further parts of the record see "Bill of Exceptions," Chapter XVII., and Record in Equity, Chapter XVIII.

<sup>3</sup> *Eldorado C. & M. Co. v. Mariotti*, 215 Fed. 51; *Fisher v. Cockrell*, 5 Pet. 254, 8 L. Ed. 114; *Lessee of Reed v. Marsh*, 13 Peters 153, 10 L. Ed. 103; *Kanouse v. Martin*, 15 How. 210, 14 L. Ed. 665; *Baltimore and P. R. R. Co. v. Church Trustees*, 91 U. S. 127, 23 L. Ed. 127.

lower courts shall be transmitted and the reviewing court may look to the opinion to ascertain the true meaning of a finding.<sup>1</sup>

### § 7. The record on writ of error—How made and returned— The statute.

“There shall be annexed to and returned *with any writ of error* for the renewal of a cause at the day and place therein mentioned an *authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.*”<sup>2</sup>

### § 8. Diligence required of plaintiff in error.

A party securing a writ of error must use diligence in perfecting it, but where he has done all in his power to perfect his writ and the judge allowing the same has done all that was necessary for him to do, the writ will not be dismissed for the failure of the clerk to discharge his duty in that connection.<sup>3</sup>

### § 9. The Rules of Court.

Rule 8 of the U. S. Supreme Court is as follows:

“The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.”

Rule XIV. of the U. S. Circuit Court of Appeals for the Second Circuit is identical with this rule, except that the rule makes specific mention requiring that the bill of exceptions shall

<sup>1</sup> Reinman v. City of Little Rock, 237 U. S. 179, 35 Sup. Ct. Rep. 511, 59 L. Ed. 900; Philadelphia Fire Association v. New York, 119 U. S. 116, 7 Sup. Ct. Rep. 108, 30 L. Ed. 342; Krieger v. Shelby R. R. Co., 125 U. S. 43, 8 Sup. Ct. Rep. 752, 31 L. Ed. 675; Adams Co. v. Burlington R. R. Co., 112 U. S. 129, 5 Sup. Ct. Rep. 77, 28 L. Ed. 678; Egan v. Hart, 165 U. S. 190, 17 Sup. Ct. Rep. 300, 41 L. Ed. 680; St. Romes v. Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. Rep. 1335, 32 L. Ed. 289; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 684, 15 Sup. Ct. Rep. 733, 39 L. Ed. 859; Stratton v. Park Commission, 145 Fed. 436; National Foundry v. Water Co., 183 U. S. 216, 22 Sup. Ct. Rep. 111, 46 L. Ed. 157; Gross v. U. S. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. Rep. 940, 27 L. Ed. 793.

<sup>2</sup> Rev. St. of U. S. Sect. 997.

<sup>3</sup> Robertson Banking Co. v. Chamberlain, 228 Fed. 500; Mutual Life Insurance Co. v. Phinney, 178 U. S. 335, 20 Sup. Ct. Rep. 906, 44 L. Ed. 1092.

be included in the record. While the rule of the Supreme Court makes no mention of it, nevertheless, it is essential that the bill of exceptions be included in the record.

**§ 10. Præcipe for record to be filed—Notice—Ten days to designate portions of record.**

Rule 8 of the Supreme Court of the United States provides:

“In order to enable the clerk to perform such duty and for the purpose of reducing the size of transcripts of record in cases brought to this court by appeal or writ of error, by eliminating all papers not necessary to the consideration of the questions to be reviewed, it shall be the duty of the appellant or plaintiff in error or his attorney to file with the clerk of the lower court, together with proof or acknowledgment of service of a copy on the appellee or defendant in error, or his counsel, a præcipe which shall indicate the portions of the record to be incorporated into the transcript of the record on such appeal or writ of error. Should the appellee or defendant in error, or his counsel, desire additional portions of the record incorporated into the transcript of the record to be filed in this court, he shall file with the clerk of the lower court his præcipe also, within ten days thereafter (unless the time shall be *enlarged* by a *judge of the lower court* or by a *justice of this court*), indicating such additional portions of the record desired by him.

“The clerk of the lower court shall transmit to this court as the transcript of the record in the case only the portions of the record below designated by both parties as above provided.”

**§ 11. Practice same in U. S. Courts of Appeal.**

In the majority of the Circuit Courts of Appeal, the same practice prevails as in the Supreme Court of the United States.<sup>1</sup>

**§ 12. Record must at least contain common law requisites.**

At any rate not less than the whole common law record should be sent up.<sup>2</sup>

Immaterial matter should not be incorporated into the record.<sup>3</sup>

<sup>1</sup> *Burnham v. N. Chicago St. R. R. Co.*, 87 Fed. R. 168, 170, 30 C. C. A. 594; *In re Robertshaw Mfg. Co.* 135 Fed. 220; Record Sect. 750 of the Rev. St.; *Goodwin v. U. S.*, 200 Fed. 121.

<sup>2</sup> *Eldorado C. & M. Co. v. Mariotti*, 215 Fed. 51; *Martina & Lowell Ry. Co. v. Boston & Lowell Ry. Co.*, 61 Fed. 237, 245, 9 C. C. A. 468. See § 4 of this Chapter as to what constitutes a common law record.

<sup>3</sup> *Eldorado C. & M. Co. v. Mariotti*, 215 Fed. 51; *Cunningham v. German Ins. Bank*, 103 Fed. 932, 43 C. C. A. 377.

**§ 13. Parties may agree what record should contain.**

Rule 8 further provides:

“The parties or their counsel, however, may agree by written stipulation to be filed with the clerk of the lower court the portions of the record which shall constitute the transcript of record on appeal or writ of error, and the clerk in such case shall transmit only the papers designated in such stipulation.”

**§ 14. Time for return—30 days—Extension.**

Thirty (30) days for return of record unless time extended.

Rule 8 of the Supreme Court of the United States provides that the clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court, within thirty days from the day of signing the citation whether the return day fall in vacation or in term time and be served before the return day.<sup>1</sup>

**§ 15. Record must be complete. Reference to other record not permitted.**

Section 3 of Rule 8 of the Supreme Court of the United States provides:

“No case will be heard until a complete record, containing in itself, *and not by reference*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court shall be filed.”<sup>2</sup>

<sup>1</sup> U. S. v. U. S. Steel Corp., 240 U. S. 442, 36 Sup. Ct. Rep. 408, 60 L. Ed. 1110, In the case of Meyers, et al., v. United States, 218 Fed. 372, where the bill of exceptions had been settled and the record printed and the parties stipulated in writing that the record so printed need not be certified but might be corrected by either party by comparing the same with the bill of exceptions, it was held unreasonable for the defendant in error, the United States, without suggesting any corrections, to refuse to stipulate that it was correct, which would necessitate an authentication of the record by the clerk at considerable expense to the plaintiff in error, and therefore the court extended the time for filing the record by plaintiff in error until the government did so stipulate.

<sup>2</sup> Identical with Rule 14 of the U. S. Court of Appeals, Second Circuit.

## CHAPTER XVII

## The Bill of Exceptions

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|---|--|
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## § 1. What is a bill of exceptions.

A bill of exceptions is in the nature of a pleading, and its office is to make matters of record which do not and cannot appear in the common law record made by the clerk of the court. Thus when the erroneous ruling does not appear on the face of the record or on demurrer, a bill of exceptions is the only method by which a judgment in a common law action will be reviewed in a national appellate tribunal.<sup>1</sup>

<sup>1</sup>Montana R. R. Co. v. Warren, 137 U. S. 350, 11 Sup. Ct. Rep. 96, 34 L. Ed. 682; Origt v. U. S., 125 U. S. 240, 8 Sup. Ct. Rep. 846, 31 L. Ed. 743; Graham v.

Motions made *dehors* the record must be preserved by a bill of exceptions.<sup>1</sup>

**§ 2. When a bill of exceptions unnecessary for review.**

Error apparent on the face of the record or in the pleadings or judgment may be reviewed without a bill of exceptions.<sup>2</sup>

**§ 3. Warning of the consequences of defective bill.**

In a recent case<sup>3</sup> the Court of Appeals for the 4th Circuit said:

“While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time the rules of this court are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions. . . .”

**§ 4. Warning of the Supreme Court.**

In the case of *Michigan Ins. Bank v. Eldred*, 143 U. S. 298

Bayne, 18 How. 60, 15 L. Ed. 265; *Prentice v. Stearns*, 113 U. S. 435, 5 Sup. Ct. Rep. 547, 28 L. Ed. 1059; *Prentice v. Zane*, 8 How. 470, 12 L. Ed. 1160; *Sparrow v. Strong*, 4 Wall. 584, 18 L. Ed. 410; *Kerr v. Clampett*, 95 U. S. 190, 24 L. Ed. 494; *Head v. Hargrave*, 105 U. S. 47, 26 L. Ed. 1029; *McFarlan Carriage Co. v. Solanas*, 45 C. C. A. 262, 106 Fed. 145.

<sup>1</sup> *Eldorado Coal & M. Co. v. Mariotti*, 215 Fed. 51, 131 C. C. A. 359.

<sup>2</sup> *Nalle v. Oyster*, 230 U. S. 165, 33 Sup. Ct. Rep. 1043, 57 L. Ed. 1439; *Denver v. Home Sav. Bank*, 236 U. S. 101, 35 Sup. Ct. Rep. 265, 59 L. Ed. 485; *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. Rep. 125, 40 L. Ed. 269; *Bram v. United States*, 168 U. S. 571, 18 Sup. Ct. Rep. 183, 42 L. Ed. 583; *Moline Plow Co. v. Webb*, 141 U. S. 625, 12 Sup. Ct. Rep. 100, 35 L. Ed. 881; *Ghost v. U. S.*, 94 C. C. A. 253, 168 Fed. 841; *Ex parte Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. Rep. 150, 32 L. Ed. 508; *Clinton v. Missouri Pac. R. R. Co.*, 122 U. S. 469, 7 Sup. Ct. Rep. 1268, 30 L. Ed. 1214; *Manning v. German Ins. Co.*, 46 C. C. A. 144, 107 Fed. 52; *Baltimore & Pac. R. R. Co. v. Sixth Presb. Church*, 91 U. S. 127, 23 L. Ed. 260; *Wilmington v. Ricaud*, 90 Fed. 214, 32 C. C. A. 579; *Francisco v. Chicago & A. R. Co.*, 79 C. C. A. 292, 149 Fed. 354; *Young v. Martin*, 75 U. S. 354, 8 Wall. 354, 19 L. Ed. 418; *Aurora v. West*, 7 Wall. 82, 19 L. Ed. 42; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Bennett v. Butterworth*, 52 U. S. 669, 11 How. 669, 13 L. Ed. 859.

<sup>3</sup> *Mound Coal Co. v. Jeffrey Mfg. Co.*, 233 Fed. 914 (C. C. A.); *Oxford & Coast Line R. R. Co. v. Union Bank*, 153 Fed. 723, 82 C. C. A. 609; *Michigan Ins. Bank v. Eldred*, 143 U. S. 298, 12 Sup. Ct. Rep. 450, 36 L. Ed. 162.

(12 Sup. Ct. 450, 36 L. Ed. 162), the court, among other things said:

“The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. *It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court. . . .*”<sup>1</sup>

### § 5. Form.

Where a bill of exception is not reduced in narrative form as provided by the rule the court may strike the bill of exception or tax the cost against the appealing party.<sup>2</sup>

### § 6. The purpose of exception.

The sole purpose of a bill of exceptions and assignment of errors is to bring separately and clearly the matters complained of (1) before the trial judge so that he may have the opportunity to grant relief if he thinks proper, (2) before counsel for defendant in error, so that he may be advised of the precise points to be met in argument, and (3) before the appellate court, so that it may readily perceive the points to be decided and the portions of the record on which they depend. Repetition not necessary to these ends should not incumber the record.<sup>3</sup>

### § 7. What the bill must contain.

A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law arising on facts not denied, in which either party is overruled by the court. It should contain only the rulings of the court upon matters of law, with so much of the testimony as may be

<sup>1</sup>City of Harper, Kans. v. Daniels, 211 Fed. 57; Copper River & N. W. Ry. v. Reede, 211 Fed. 280.

<sup>2</sup>Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 956 (C. C. A. 4th Cir.); Chesborough v. Woodworth, 195 Fed. 875 (C. C. A. 6th Cir.).

Norfolk & W. Ry. Co. v. Holbrook, 215 Fed. 688 (C. C. A.).

necessary to explain the bearing of the rulings upon the issues involved.<sup>1</sup>

### § 8. Must point out errors of law.

Every bill of exceptions should point out distinctly the errors of which complaint is made. It ought also to show the grounds relied upon to sustain the objection presented, so that it may appear that the court below was informed as to the point to be decided.<sup>2</sup>

### § 9. Bill must present substantial controversy.

Each bill of exception must be considered as presenting a substantial case, and it is the evidence stated in it alone on which the court will decide.<sup>3</sup>

### § 10. Evidence—How preserved and exceptions saved.

Sect. 2, Rule 4, of the U. S. Supreme Court provides:

“Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein *shall be set forth in condensed and narrative form*, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.”

The evidence must be brought up by a bill of exceptions.<sup>4</sup>

### § 11. When the entire evidence necessary.

Where the claim is that there was not sufficient evidence to submit to the jury, the whole evidence should be transmitted to the appellate court.

<sup>1</sup> Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661; Duncan v. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, 58 Fed. 171; Ex parte Crane 5 Pet. 190, 8 L. Ed. 92.

<sup>2</sup> Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661; Duncan v. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

<sup>3</sup> Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661; Jones v. Buckell, 104 U. S. 554, 26 L. Ed. 841.

<sup>4</sup> The E. A. Packer v. New Jersey Co., 140 U. S. 360, 11 Sup. Ct. Rep. 794, 35 L. Ed. 453; Pearsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Suydam v. Williamson, 20 How., 427, 15 L. Ed. 978; The Fullerton, 211 Fed. 833.



While it is the better practice to insert in the bill of exception an affirmative statement to the effect that it contains all the evidence offered at the trial, it is sufficient where this fact can be gathered by inference.<sup>1</sup>

### § 12. Exceptions to charge.

Sect. 1, Rule 4, of the Supreme Court of the U. S. provides:

"No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

Rule X. of the U. S. Circuit Court of Appeals for the 2d Circuit is materially different and is as follows:

"The judges of the circuit and district courts shall not allow any bill of exceptions unless the same contain the whole charge of the court to the jury. No general exception to the whole of such charge shall be allowed, but the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts."

### § 13. Documents—How identified.

All documents should be incorporated in the bill of exceptions or annexed to it, properly identified.<sup>2</sup>

### § 14. Objecting to evidence because complaint does not state cause of action.

The practice of objecting to the introduction of evidence on the ground that the complaint or declaration does not state a cause of action does not prevail in the national courts and is regarded as very objectionable. The fact that it may be permitted

<sup>1</sup> *Clyatt v. U. S.*, 197 U. S. 207, 25 Sup. Ct. Rep. 429, 49 L. Ed. 726; *Crowe v. Trickey*, 204 U. S. 228, 27 Sup. Ct. Rep. 275, 51 L. Ed. 454; *Crowe v. Harmon*, 204 U. S. 241, 27 Sup. Ct. Rep. 280, 51 L. Ed. 461; *Gunnison Co. v. Rollins*, 173 U. S. 255, 19 Sup. Ct. Rep. 390, 43 L. Ed. 689.

<sup>2</sup> *Whitaker v. U. S.*, 220 Fed. 714; *Copper River & N. W. Ry. Co. v. Reede*, 211 Fed. 280; *Herbert v. Butler*, 97 U. S. 319, 24 L. Ed. 958; *Hanna v. Mass.*, 122 U. S. 26, 7 Sup. Ct. Rep. 1035, 30 L. Ed. 1118; *Leftwich v. Lecann*, 4 Wall. 187, 18 L. Ed. 388.

in the courts of the State where this cause was pending is immaterial.<sup>1</sup>

Nor does it apply even in criminal cases where technical rules of practice are much more strictly observed than in civil cases.<sup>2</sup>

**§ 15. Exceptions to charge must be taken before jury retire.**

It must appear from the bill of exceptions not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the Bar or they will be unavailing.<sup>3</sup>

Otherwise, the appellate tribunal will not as a rule consider it.<sup>4</sup>

A paper in the record styled "Exceptions to the charge to jury," initialed "J. B. McP. Trial Judge" and signed by the plaintiff is not a bill of exceptions.<sup>5</sup>

A party excepting to a charge must specify the precise portion of the charge that he excepts to. A general exception to the whole charge is insufficient, if any part of it is good.<sup>6</sup>

**§ 16. Must obtain ruling from trial court.**

A party must make every reasonable effort to secure from the trial court correct rulings, or such, at least, as are satisfactory to him before he will be permitted to ask any review by the appellate

<sup>1</sup> Fisher Mach. Co. v. Dougherty, 231 Fed. 316 (C. C. A.), 8th Cir.; Bell v. R. R. Co., 4 Wall. 598, 18 L. Ed. 338; Oregon R. R. Navigation Co. v. Dumas, 181 Fed. 181, 104 C. C. A. 641; Boatmen's Bank v. Trower Bros. Co., 181 Fed. 804, 807, 104 C. C. A. 314.

<sup>2</sup> Morris v. United States, 161 Fed. 672, 678, 88 C. C. A. 532; United States Portland Cement Co. v. Harvey, 216 Fed. 316 (C. C. A. 8th Cir.).

<sup>3</sup> Fisher Mach. Co. v. Dougherty, 231 Fed. 910 (C. C. A.); Arizona & New Mexico Ry. Co. v. Clark, 207 Fed. 817; Western Union Teleg. Co. v. Baker, 85 Fed. 690; Starr Co. v. Madden, 188 Fed. 910; Manhattan Canning Co. v. Wilson, 217 Fed. 41; Bridwell v. George B. Douglas, 183 Fed. 93.

<sup>4</sup> Fisher Mach. Co. v. Dougherty, 231 Fed. 910 (C. C. A.); Balson Cooper Co. v. Pedin, 217 Fed. 43 (C. C. A. 9th Cir.); Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305; Western Union Teleg. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392; Starr v. Madden, 188 Fed. 910, 110 C. C. A. 652; Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643; Phelps v. Mayer, 211 Fed. 113.

<sup>5</sup> U. S. ex rel. Kinney v. U. S. Fidelity & Guaranty Co., 222 U. S. 283, 32 Sup. Ct. Rep. 101, 56 L. Ed. 200; Origet v. U. S. 125 U. S. 243, 8 Sup. Ct. Rep. 846, 31 L. Ed. 745.

<sup>6</sup> Southern Pac. Co. v. Stewart (C. C. A.), 233 Fed. 956.

tribunal; and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of the court provides:

"The party excepting shall be required to state distinctively the several matters of law in such charge to which he excepts; and those matters of law, and those only shall be inserted in the bill of exceptions and allowed by the court."<sup>1</sup>

### § 17. State Court practice not followed.

The practice prevailing in the State courts in common law actions has no application in the matter of settlement and preparation of bills of exception, which is governed solely by Federal rules.<sup>2</sup>

### § 18. By whom signed and settled.

A bill of exceptions must be signed by the trial judge.<sup>3</sup>

In case of the death or incapacity of the trial judge, any judge may settle it in pursuance to Section 953 U. S. Comp. St. 1901.<sup>4</sup>

### § 19. Time for signing and settling a bill of exceptions.

The bills of exceptions must be prepared and settled during order, made by the judge during the term, extending the time beyond the term, or full consent of parties, express or implied from stringent circumstances.<sup>5</sup>

<sup>1</sup> Philadelphia Casualty Co. v. Fehheimer, 220 Fed. 401; Allis v. United States, 155 U. S. 117, 15 Sup. Ct. Rep. 36, 39 L. Ed. 91; Block v. Darling, 140 U. S. 234, 238, 11 Sup. Ct. Rep. 832, 35 L. Ed. 475; Beaver v. Taylor, 93 U. S. 46, 23 L. Ed. 797.

<sup>2</sup> McBride v. Neal, 214 Fed. 266; Fuller v. U. S., 182 U. S. 562, 21 Sup. Ct. Rep. 871, 45 L. Ed. 1230; Bronson v. Schullter, 104 U. S. 410, 26 L. Ed. 797; Fleitas v. Richardson, 147 U. S. 538, 13 Sup. Ct. Rep. 429, 37 L. Ed. 272; Manning v. German Ins. Co., 107 Fed. 52, 46 C. C. A. 144; Van Stone v. Stilwell & B. Mfg. Co., 142 U. S. 128, 12 Sup. Ct. Rep. 181, 35 L. Ed. 961; Fishburn v. Chicago M. & St. P. R. Co., 137 U. S. 60, 11 Sup. Ct. Rep. 8, 34 L. Ed. 585; Missouri Pac. R. Co. v. Chicago & Alton R. R. Co., 132 U. S. 191, 10 Sup. Ct. Rep. 65, 33 L. Ed. 309; Re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. Rep. 150, 32 L. Ed. 508.

<sup>3</sup> Duluth St. Ry. Co. v. Spears, 204 Fed. 573, 123 C. C. A. 99; Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913 Chicago G. W. R. Co. v. Lehigh, 233, Fed. 384.

<sup>4</sup> Guardian Ass. Co. v. Quintona, 227 U. S. 100, 108, 33 Sup. Ct. Rep. 236, 57 L. Ed. 437.

<sup>5</sup> Robertson v. Cockrell, 209 Fed. 843, C. C. A.; Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. Rep. 43, 37 L. Ed. 1037; United States v. Jones, 149 U. S. 263, 13 Sup. Ct. Rep. 840, 37 L. Ed. 726; Hume v. Bowie, 148 U. S. 245, 13 Sup. Ct. Rep. 582, 37 L. Ed. 438; Glaspell v. North-

**§ 20. One or several bills.**

It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions.<sup>1</sup>

**§ 21. Of no avail unless exceptions taken at the trial.**

An exception must show that it was taken and reserved at the trial, and this must appear affirmatively on the record. But it may be drawn out in form, and signed or sealed afterwards by the judge.<sup>2</sup>

When a bill of exceptions is signed during the trial, purporting to contain a recital of what transpired during the trial, it will be assumed that all things therein stated took place at the trial, unless from its language the contrary is disclosed.<sup>3</sup>

No bill of exceptions can be allowed by the court below, nor entertained by the appellate court, unless it appears from the record that an exception was taken to the ruling of the court below.<sup>4</sup>

**§ 22. Rule in New York.**

But it has been held that in the Southern District of New York

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ern Pacific, 144 U. S. 211, 12 Sup. Ct. Rep. 593, 36 L. Ed. 409; Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. Rep. 450, 36 L. Ed. 162; Jones v. Grover & Baker Sewing Machine Co., 131 U. S., Appendix cl, 24 L. Ed. 925; Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661; Muller v. Ehlers, 91 U. S. 251, 23 L. Ed. 319; U. S. v. Breitling, 20 How. 253, 15 L. Ed. 900; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726; Railroad Co. v. McGee, 8 U. S., App. 86, 2 C. C. A. 81, 50 Fed. 906; Lumber Co. v. Chapman, 20 C. C. A. 503, 74 Fed. 444.

<sup>1</sup> Norfolk & W. Ry. Co. v. Holbrook, 215 Fed. 7687; Lees v. United States, 150 U. S. 482, 14 Sup. Ct. Rep. 163, 37 L. Ed. 1150.

<sup>2</sup> Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661; U. S. v. Carey, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67.

<sup>3</sup> Heard v. U. S., 228 Fed. 503; N. O. & N. E. R. R. v. Jones, 142 U. S. 18, 23, 12 Sup. Ct. Rep. 109, 35 L. Ed. 919.

<sup>4</sup> Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed. 913; Prioleau v. United States, 143 Fed. 320, 74 C. C. A. 458; Gila Valley G. & N. R. R. v. Hall, 232 U. S. 94, 34 Sup. Ct. Rep. 229, 58 L. Ed. 521; Magruder v. Drury, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. Ed. 151.

a bill of exceptions must be signed within the time limited by the rules or order of the court, although the term has not expired.<sup>1</sup>

### § 23. Adjournments during term for settling bill of exceptions.

During the term the court has power to continue the cause for the purpose of settling, allowing, signing, and filing the bill of exceptions.<sup>2</sup>

### § 24. Extension of time by consent.

By consent of parties *given during the term* the court may sign a bill of exceptions after the term.<sup>3</sup>

### § 25. Reservation by order or consent.

Unless, during the trial term, authority has been reserved or consent given by the parties, the court cannot after term allow a bill of exceptions then first presented, to alter or amend a bill of exceptions previously signed.<sup>4</sup>

### § 26. TRIAL BEFORE THE COURT IN COMMON LAW CASES. † Special findings—The Statute.

Sec. 700 of the Rev. Statutes of the U. S. provides:

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, *if excepted to at the time, and duly presented by a bill of exceptions*, may be reviewed by the Supreme Court upon a writ of error or upon appeal; *and when finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.*”

The statute abolishing the Circuit Court of U. S. has extended the operation of the above provision to the U. S. District Court.

<sup>1</sup> McBride v. Neal, 214 Fed. 966; In re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. Rep. 150, 32 L. Ed. 508.

<sup>2</sup> Freeman v. U. S., 227 Fed. 740; Ward v. Cochran, 150 U. S. 597, 610, 14 Sup. Ct. Rep. 230, 37 L. Ed. 1195.

<sup>3</sup> Freeman v. U. S., *supra*; Waldron v. Waldron, 156 U. S. 378, 15 Sup. Ct. Rep. 383, 39 L. Ed. 457, and cases cited.

<sup>4</sup> Freeman v. U. S., *supra*; The Bayonne, 159 U. S. 693, 16 Sup. Ct. Rep. 185, 40 L. Ed. 306; Waldron v. Waldron, 156 U. S. 378, 15 Sup. Ct. Rep. 383, 39 L. Ed. 457; United States v. Jones, 149 U. S. 263, 13 Sup. Ct. Rep. 840, 37 L. Ed. 726; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. Rep. 450, 36 L. Ed. 162; Honey v. Chicago B. & Q. R. R. Co., 82 Fed. 774, 27 C. C. A. 264; Talbott v. Press Pub. Co., 80 Fed. 568.

**§ 27. Decisions construing. Request for findings.**

In order to obtain a review of a judgment of a Federal Court sitting as a jury, it is imperative that a request for findings of fact be made or that objections be made in some form to the evidence, because a mere general finding will not be reviewed.<sup>1</sup>

**§ 28. Effect of findings.**

Findings of fact made by the court have the same effect as a verdict of a jury and are binding on the appellate tribunal and cannot be reviewed on a writ of error.<sup>2</sup>

**§ 29. Must be preserved by bill of exceptions.**

And the rulings and proceedings of the trial judge must be preserved by a bill of exceptions.<sup>3</sup>

**§ 30. When bill of exceptions unnecessary.**

When the court makes findings of fact, a bill of exceptions is unnecessary to test the sufficiency of the facts found to support the judgment as a matter of law.<sup>4</sup>

And no exception to the finding is necessary.<sup>5</sup>

No exception to ruling on demurrers or any other pleading.<sup>6</sup>

**§ 31. Inferences in absence of findings.**

In the absence of findings by the trial court, inferences of facts to establish ultimate facts cannot be drawn by an ap-

<sup>1</sup> *Hosler v. Ireland*, 219 Fed. 489 (C. C. A.).

<sup>2</sup> *U. S. v. U. S. Fidelity Co.*, 236 U. S. 512, 35 Sup. Ct. Rep. 298, 59 L. Ed. 696; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. Rep. 308, 45 L. Ed. 457; *Stanley v. Schwalbey*, 162 U. S. 255, 40 L. Ed. 960, 16 Sup. Ct. Rep. 754; *Louisville v. Halliday*, 154 U. S. 657; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. Rep. 837, 38 L. Ed. 694.

<sup>3</sup> *Fruth v. Bennaso*, 219 Fed. 547. And see "Reversible Errors—Trial by the Court," Chapter IV., § 38.

<sup>4</sup> *Dunsmuir v. Scott*, 217 Fed. 200; *Streeter v. Chicago Sanitary District*, 133 Fed. 131, 66 C. C. A. 197.

<sup>5</sup> *Philadelphia Casualty Co. v. Fechheimer*, 220 Fed. 401 (C. C. A.); *Guaranty Trust Co. of New York v. New York, Koehler*, 195 Fed. 669.

<sup>6</sup> *Denver v. Holmes Savings Bank*, 236 U. S. 101, 35 Sup. Ct. Rep. 265, 59 L. Ed. 485; *Nalle v. James Foyster et al.*, 230 U. S. 165, 33 Sup. Ct. Rep. 1043, 57 L. Ed. 1439; *Snowden v. Canal Co.*, 238 Fed. 495 (C. C. A., 8th Cir.).

pellate court from the testimony which may be found in the record.<sup>1</sup>

### § 32. Agreed statement of facts.

But the agreed statement of facts, so far as it sets forth ultimate facts as distinguished from evidentiary facts, may be considered as taking the place of special findings.<sup>2</sup>

<sup>1</sup> *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *W. L. Perkins Co. v. Von Baumbach*, 185 Fed. 265, 107 C. C. A. 371; *Streeter v. Sanitary District of Chicago*, 133 Fed. 124, 66 C. C. A. 190; *Anglo-American Land M. & A. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89; *Connor et al. v. U. S.*, 214 Fed. 522.

<sup>2</sup> *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1.

## CHAPTER XVIII

## The Record in Equity

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## § 1. Admonition to the Bar to prepare their records carefully.

The United States Circuit Court of Appeals for the 5th Circuit issued the following warning to the members of the Bar of the 5th Circuit.

"Our attention was called in the oral argument to the fact that the transcript of record is not made up, as it might well have been, in accordance with the seventy-fifth, seventy-sixth, and seventy-seventh equity rules of the Supreme Court (226 U. S., Appendix, pp. 23, 24, 33, Sup. Ct. xl, xli), and that it is diffuse, containing much unnecessary matter, including duplicates of many papers and immaterial parts of exhibits, documents, etc., and we were urged to impose costs for the infraction of the rules.

"In this particular case, as we affirm the judgment, the costs will be taxed to the appellant, a trustee in bankruptcy, and it appears that the only real relief we could give in the matter would be to tax the unnecessary costs to the solicitors who admittedly directed the preparation of the transcript. As no motion was put on record in the case, we are indisposed to apply this extreme remedy; *but we take occasion to admonish the Bar generally that the above-mentioned rules of the Supreme Court are to be enforced, and that it is incumbent upon the solicitors taking out an appeal to see that they are complied with.*"<sup>2</sup>

<sup>2</sup> *Coxe v. Peck-Williamson Heating & Ventilating Co.*, 208 Fed. 409 (C. C. A., Fifth Circuit). See also *Firestone Tire & Rubber Co. v. Seberling*, 236 Fed. 891 (C. C. A. Sixth Circuit).



**§ 2. Taxing costs against attorneys—when.**

"If this court shall find that portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fee for supervising the printing and of the cost of printing the record be paid by the offending party."<sup>1</sup>

**§ 3. Record on appeal in equity—Abstracting testimony. Præcipe. Notice and service.**

Equity Rule 75 promulgated by the Supreme Court of the U. S. provides:

"In case of appeal:

"(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

"(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete, and properly prepared, it shall be approved by the court or judge, and if it be not true, complete, or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

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<sup>1</sup> Rule 8 of Supreme Court.

"(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject."<sup>1</sup>

**Rule 76. Record on appeal—reduction and preparation—costs—correction of omissions.**

"In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents, and other papers included therein; and for any infraction of this or any kindred rule of the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

**Rule 77. Record on appeal—agreed statement.**

"When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal."

**§ 4. Record in bankruptcy.**

Clause 3 of General Order 36 reads as follows:

"In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a

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<sup>1</sup> *Firestone Tire & Rubber Co. v. Seberling*, 236 Fed. 891 (C. C. A., Sixth Circuit). This rule does not apply to records printed in the court below before the rule became in force. *U. S. v. U. S. Steel Corporation*, 240 U. S. 442, 36 Sup. Ct. Rep. 408, 60 L. Ed. 731.

finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."<sup>2</sup>

### § 5. Mistaken designation—effect of.

Where appellant being doubtful of his procedure, instead of preparing a statement of the evidence in narrative form reduced the evidence in the form of a bill of exceptions, it was held that it will be treated as a statement of evidence under Equity Rule 65.<sup>3</sup>

### § 6. Opinions of the court annexed to record.

Section 2 of Rule 8 of the Supreme Court of the United States further provides:

"In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a *copy of the opinion or opinions filed in the case.*"<sup>3</sup>

Formerly the opinions of the State Court were not considered part of the record. Later it has been held that opinions of the court form a part of the record where the statute of the State requires the court to file opinions in each case.<sup>4</sup>

### § 7. Opinions of the courts of the State of New York.

The opinions of the Supreme Court of New York are regarded as being a part of the record.<sup>5</sup>

### § 8. The rule generally.

It is now the general practice of the Supreme Court to examine

<sup>2</sup> Chapman v. Bowen, 207 U. S. 89, 28 Sup. Ct. Rep. 32, 52 L. Ed. 116, 117; Lehen v. Dickson, 148 U. S. 71, 74, 37 L. Ed. 373, 374, 13 Sup. Ct. Rep. 481; British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 35 L. Ed. 147, 11 Sup. Ct. Rep. 523, and cases cited.

<sup>3</sup> Westerman Co. v. Dispatch Printing Co. (C. C. A., 6th Cir.), 233 Fed. 609.

<sup>3</sup> Rule XIV. of the U. S. Court of Appeals for the Second Circuit is identical with this rule.

<sup>4</sup> Phila. Casualty Co. v. Fechheimer, 220 Fed. 401; Thompson v. R. R. Co., 168 U. S. 457, 18 Sup. Ct. Rep. 121, 42 L. Ed. 539; Gross v. U. S. Mortgage Co., 108 U. S. 477, 27 L. Ed. 795, 2 Sup. Ct. Rep. 940.

<sup>5</sup> Wood Mowing & Reaping Co. v. Skinner, 139 N. Y. 293.

the opinions of the lower courts for the purpose of ascertaining whether a Federal question was presented and decided.\*

### § 9. Record—Who must print.

"The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of Sections 2, 3, 4, 5, 6, and 9, of Rule 10."

Rule 2, U. S. Supreme Court.

### § 10. Translations.

"Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will order that a translation be supplied and inserted in the record."

Rule 11, U. S. Supreme Court.

### § 11. Models, diagrams, and exhibits of material.

"1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

"2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best."

Rule 33, U. S. Supreme Court.

### § 12. Original papers. Transcript of the record—The statute.

Section 698 of the Revised Statutes of the United States provides:

"Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be

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\* *Tiernan v. Chicago L. I. Co.*, 214 Fed. 238; *Loeb v. Columbia Twp. Co.*, 179 U. S. 472, 21 Sup. Ct. Rep. 174, 45 L. Ed. 280; *U. S. v. Taylor*, 147 U. S. 695, 13 Sup. Ct. Rep. 479, 37 L. Ed. 335; *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. Rep. 1113, 41 L. Ed. 211; see also Chap. XVI., § 6, "Opinions."

made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: Provided, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes."

### § 13. The Rule.

Section 4, of Rule 8 of the Supreme Court of the United States provides:

"Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings."

Identical with Rule 14 of United States Court of Appeals, Second Circuit.

But this cannot be done merely to save expense.<sup>1</sup>

### § 14. Practice in Second Circuit.

It seems that by general consent of the bar of this circuit the requirements of Equity Rule 75 are dispensed with. This is done by written stipulation waiving the rule, supplemented by an order of the trial judge directing the record to be printed in *hoc verba*. It has not yet been decided whether the provisions of Rule 75 may be waived by consent. There is but one case on record<sup>2</sup> where the Supreme Court waived the Rule, but it did this for *exceptional* reasons. The Supreme Court never intimated that the rule may be dispensed with by mere consent of counsel and the trial judge.

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<sup>1</sup> *Dowagiac Mfg. Co. v. Brennan*, 156 Fed. 213.

<sup>2</sup> *U. S. v. U. S. Steel Corporation*, 240 U. S. 442, 36 Sup. Ct. Rep. 408, 60 L. Ed. 731.

## CHAPTER XIX

## Procedure in the Appellate Courts

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- | Sec.   | Sec.  |
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| 43. Placing a cause on summary docket.         | (b) In equity.  |
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| 45. Precedence. Advancing causes on motion.    | 57. Costs:  |
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| 52. Effect of failure to appear or file brief: | 58. Damages for delay on affirmance in error.         |
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| 55. In criminal cases—Rehearing by Government. | 65. Process.  |
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### § 1. FILING THE RECORD AND DOCKETING THE CAUSE. **Time.**

Rule 9 of the U. S. Supreme Court provides:

"1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court."<sup>1</sup>

The record must be filed before the end of the next term succeeding the issue of the writ of error or the allowance of the

<sup>1</sup> Identical with Rule 16 of U. S. Court of Appeals, Second Circuit.

appeal, unless the time is enlarged by the judge or justice issuing the citation, as provided by the rule of the Supreme Court and rule of the Court of Appeals. A failure to do so will deprive the Appellate Court of jurisdiction.<sup>1</sup>

### § 2. Fees and deposits. Deposit on docketing.

The present practice is to deposit with the clerk of the reviewing court the sum of \$25 at the time the cause is docketed, in lieu of a special bond to protect the clerk's fees, which was the former practice.<sup>2</sup> The sum of \$35 is required to be deposited with the Clerk of the Court of Appeals in the Second Circuit.

### § 3. Enlarging time to file record.

An order extending time to file record made by a district judge, who did not sign the citation and not a member of the Court of Appeals, is void for want of jurisdiction.<sup>3</sup>

### § 4. Time for return.

Section 5, of Rule 8 of the Supreme Court of the United States provides:

"All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day, except in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii, and Porto Rico, when the time shall be extended to sixty days and from the Philippine Islands to one hundred and twenty days."<sup>4</sup>

### § 5. Appellee or defendant in error may docket.

"But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument."<sup>5</sup>

<sup>1</sup> Freeman v. U. S. 227 Fed; 732; Hill v. Chicago & Evanston R. R. Co., 129 U. S. 170, 9 Sup. Ct. Rep. 269, 32 L. Ed. 651; Edmonson v. Bloomshire, 7 Wall. (U. S.) 309, 19 L. Ed. 91.

<sup>2</sup> Section 7 of Rule XXIV. of the Supreme Court of the United States.

<sup>3</sup> West v. Irwin, 54 Fed, 419, 4 C. C. A. 401; Freeman v. U. S., 227 Fed. 732.

<sup>4</sup> Thirty (30) days is the limit for return in the Second Circuit. See Rule 14.

<sup>5</sup> § 2, Rule 9, U. S. Supreme Court Rules.



This rule is identical with Rule 16.

**§ 6. Appearance of counsel. Must be member of the Bar of the U. S. Supreme Court.**

*“Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.”<sup>1</sup>*

It may be added that the attorney entering the appearance must be a member of the Bar of the Supreme Court of U. S. and must sign his individual and not firm name.

**§ 7. Appearance by appellee in admiralty.**

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.<sup>2</sup>

**§ 8. Must be returned not later than the next term.**

The writ of error becomes void if not returned at the next term.<sup>3</sup>

Where the transcript or return is filed in the Appellate Court after the return day named in the writ, but before the expiration of the next term after the writ issued, the writ is in force unless before the filing of the transcript or return the defendant in error has moved to dismiss the case. If the case is not so docketed and dismissed by the appellee, the appellant is in time if the record be filed during the return term.<sup>4</sup>

<sup>1</sup>§ 3, Rule 9, U. S. Supreme Court.

<sup>2</sup> Rule 6 in Admiralty.

<sup>3</sup> Blair v. Miller, 4 Dallas 21, 1 L. Ed. 724.

<sup>4</sup> Evans v. Bank, 134 U. S. 330, 331, 10 Sup. Ct. 493, 494, 33 L. Ed. 917; Chow Loy v. United States, 112 Fed. 354, 357, 50 C. C. A. 279; Green v. Elbert, 137 U. S. 615, 621, 11 Sup. Ct. 188, 34 L. Ed. 792; Southern Pine Co. v. Ward, 208 U. S. 126, 137, 28 Sup. Ct. Rep. 239, 52 L. Ed. 420; Gould v. United States, 205 Fed. 844 (C. C. A. 8th Cir.); Ponder v. Brown, 120 Fed. 496, 56 C. C. A. 664; Taylor v. Leesnitzer, 220 U. S. 90, 31 Sup. Ct. Rep. 371, 55 L. Ed. 382; Altenberg v. Grant, 83 Fed. 980, 28 C. C. A. 244; Thomas v. Green County, 146 Fed. 969, 77 C. C. A. 487; Martin v. Burford, 176 Fed. 554, 100 C. C. A. 159; Gilbert v. Hopkins, 198 Fed. 849, 117 C. C. A. 491; Shea v. U. S., 224 Fed. 426.

**§ 9. Rules directory only.**

The rules relating to the time within which the record must be filed in the Appellate Court are not jurisdictional, but directory, and whether a cause will be dismissed for failure to file the record in time rests in the sound discretion of the court.<sup>1</sup>

**§ 10. SETTLING THE RECORD. Statement of errors to be filed after docketing cause.**

Section 9 of Rule 10 of the Supreme Court of the United States provides:

"The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper."

**§ 11. PRINTING THE RECORD. Clerk to demand estimated cost.**  
Sections 2 and 9 of Rule 10 of the Supreme Court:

"2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the clerk to report that fact to the court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

"9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the clerk a statement of the points on which he intends to reply and of the parts of the record which he thinks necessary for the

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<sup>1</sup>Freeman v. U. S., 227 Fed. 732; Florida v. Phosphate Co., 70 Fed. 883, 17 C. C. A. 472.

consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper."

The fees of the clerk under Rule 24, Section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

Where a *final* judgment or decree is sought to be reviewed by writ of error or appeal, the Act of February 13, 1911, C. 47, 36 Stat. 901, U. S. Comp. Stat. Supp. 1911, p. 275, abolishes the Court of Appeals clerk's fee for supervising the printing of the transcript. This act does not apply to interlocutory decrees.<sup>1</sup>

## § 12. Practice in Second Circuit.

In cases which fall within the provisions of the Act of February 13, 1911, the plaintiff in error or appellant will print the record and serve copies thereof in accordance with the provisions of said Act. In other cases, on the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount

<sup>1</sup> *Smith v. Farben fabriken*, 197 Fed. 894, 117 C. C. A. 133; *Lovell McConnell Co. v. Auto Supply Co.*, 235 U. S. 388, 35 Sup. Ct. Rep. 132, 59 L. Ed. 282; *Rainey v. Grace*, 231 U. S. 703, 34 Sup. Ct. Rep. 242, 58 L. Ed. 445.

paid for printing the record shall be taxed against the party against whom costs are given.<sup>1</sup>

**§ 13. When printed copies supplied.**

The clerk of U. S. Court of Appeals can make no charge for any service in connection with the printing of the record, where the appellant furnishes the requisite number of printed copies of the record and otherwise complies with the rule.<sup>2</sup>

**§ 14. Cost for preparing record.**

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.<sup>3</sup>

**§ 15. Filing printed records used in court below.**

"In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals, the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: Provided, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required.

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<sup>1</sup> Rule 23, C. C. A. Second Circuit.

<sup>2</sup> *Rainey v. W. R. Grace Co.*, 231 U. S. 703, 34 Sup. Ct. Rep. 242, 58 L. Ed. 445.

<sup>3</sup> Rule 24, U. S. Supreme Court.

“That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required.”<sup>1</sup>

### § 16. Printed record used in the State court may be refiled in the U. S. Supreme Court.

The printed record used in the highest court of the State may be utilized in the United States Supreme Court, provided thirty copies of same are furnished to the clerk of the United States Supreme Court. Parties contemplating carrying their cases to the Supreme Court of the United States should print their records on unglazed paper, this being the rule provided for the printing of records in that court.

### § 17. Cost of printing to be taxed against losing party.

There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States.<sup>2</sup>

<sup>1</sup> 36 Stat. L. 901. From 1912 Supp. Fed. Stat., p. 255.

<sup>2</sup> 36 Stat. L. 1160.

### § 18. Death of a party.

(a) "Whenever pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error or appellee shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error or appellant he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District, from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.<sup>1</sup>

(b) Mandamus does not reach the office, but is directed to the officer to compel him to perform a duty imposed upon him by law. The death of the officer therefore abates the suit.<sup>2</sup>

There can be no substitution of parties in a case against a public official, if the wrongful act complained of was personal to the defendant officer who died.<sup>3</sup>

"When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate."<sup>4</sup>

(c) "When either party to a suit in a court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in such court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree super-

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<sup>1</sup> § 1, Rule 15, U. S. Supreme Court.

<sup>2</sup> Pullman Co. v. Groom, 231 U. S. 571, 34 Sup. Ct. Rep. 182, 58 L. Ed. 375.

<sup>3</sup> Pullman Co. v. Groom, 231 U. S. 571, 34 Sup. Ct. Rep. 182, 58 L. Ed. 375.

<sup>4</sup> § 2 Rule 15.

seded or stayed in the same manner as now is allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases."<sup>1</sup>

### § 19. *Certiorari* for diminution of record.

"No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay."<sup>2</sup>

The motion will not be granted if not made at the first term as required by Rule 14, unless a satisfactory cause is shown for the delay.<sup>3</sup>

<sup>1</sup> § 3, Rule 15, U. S. Supreme Court.

<sup>2</sup> Rule 14, U. S. Supreme Court. Identical with Rule 18 of Circuit Court of Appeals.

<sup>3</sup> *Apapas v. U. S.*, 233 U. S. 587, 34 Sup. Ct. Rep. 704, 58 L. Ed. 1104; *Chappell v. United States*, 160 U. S. 499, 510, 16 Sup. Ct. Rep. 397, 40 L. Ed. 510, 49 Fed. 139, 1 C. C. A. 139.

Where the party was negligent in the preparation of the record, the motion will be denied.

**§ 20. Proceedings after docketing cause. Printed records and briefs. Form and size. Supreme Court.**

Rule 31 of the Supreme Court of U. S. provides that all records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

**Form and size of records and briefs in Circuit Court of Appeals.**

**FIRST CIRCUIT.** The rule as to form and size of records and briefs is the same as in the Supreme Court of the United States. (See Rule 31, U. S. Supreme Court, see p. 264 *ante*).

**SECOND CIRCUIT.** Rule 26 of the United States Circuit Court of Appeals for the Second Circuit provides that all arguments and briefs for the use of the court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width.

**THIRD CIRCUIT.** The rule as to form and size of records and briefs is the same as in the Supreme Court of the United States. (See Rule 31, U. S. Supreme Court, see p. 264, *ante*).

**FOURTH CIRCUIT.** Rule 26 of the United States Circuit Court of Appeals for the Fourth Circuit provides that all transcripts of record, addenda thereto, arguments, and briefs printed for the use of this court shall be in small pica type, 24 pica "ems" to a line, on unglazed paper, with an index and a suitable cover containing the title of the court, the cause, and the court from which the case is brought into this court, and the number of the case. Size of pages to be  $9\frac{1}{4}$  x  $6\frac{1}{4}$  inches, except that in patent cases the size of the pages shall be  $10\frac{3}{4}$  x  $7\frac{5}{8}$  inches; that is to say, large enough to bind in copies of Patent Office drawings and specifications without folding. So much of the record as was



printed in the court below may be used in this court if it conform to this rule.

**FIFTH CIRCUIT.** The rule as to form and size of records and briefs is the same as in the Supreme Court of the United States. (See Rule 31, U. S. Supreme Court, p. 264 *ante*).

**SIXTH CIRCUIT—RECORDS.** Rule 21 of that court provides that all records shall be of a uniform size printed on unglazed paper in small pica type, twenty-four pica ems to a line, forty-eight lines to a page solid, with an index and suitable cover containing the title of the court and cause, the court from which the cause is brought, and the number of the case; the size of the pages are to be nine and one-half by six and one-half inches, except that, in patent cases, the size of the page must be ten and three-quarters by seven and five-eighths inches.

**BRIEFS.** Printed arguments and briefs of attorneys shall conform as far as practicable to the size and style of printed records, but shall contain about thirty-six lines to the page and be leaded with at least two point leads.

**SEVENTH CIRCUIT.** The rule as to form and size of records and briefs is the same as in the Supreme Court of the United States. (See Rule 31, U. S. Supreme Court.)

**EIGHTH CIRCUIT.** Rule 26 of the Circuit Court of Appeals for the Eighth Circuit provides:

(1) That all records, arguments, and briefs for the use of the court must be printed on unglazed paper not less than six and one-quarter inches wide and nine and one-half inches long, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of 80 pounds per ream on basis of size of sheet 25 x 38 inches.

(2) **PATENT CASES.** All records and briefs in patent cause may be printed on unglazed paper, of the weight as provided in section one of this rule, of such size that copies of letters patent may be inserted therein without folding, but the size of such records and briefs in patent causes shall not be less than

seven and one-half inches wide and nine and one-half inches long so that the records and briefs can be conveniently trimmed and bound in volumes.

(3) All records, briefs, supplemental transcripts, and returns to writs of certiorari shall be printed in clear eleven point or small pica type (never smaller than ten point), of 26 pica or 28 small pica ems to a line, and 52 lines, including running head, solid, per printed page, containing substantially, 1400 small pica ems. Where testimony or depositions by question and answer are printed the answer shall follow on same line as the question whenever the same can be done.

(4) All indexes to records and tabular exhibits, which from their nature require smaller type, may be printed in eight point or brevier type.

(5) All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25 by 40 inches.

**NINTH CIRCUIT—RECORDS.** Rule 26 of the United States Circuit Court of Appeals for the Ninth Circuit provides as follows:

“All records printed for the use of the court must be printed on unglazed paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.”

**BRIEFS.** Rule 26 of the United States Circuit Court of Appeals for the Ninth Circuit provides as follows:

“All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing

paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed."

### § 21. Time for filing briefs.

The counsel for plaintiff in error must file with the clerk of the Supreme Court at least three weeks before the case is called for argument thirty copies of a printed brief, one of which shall be signed in ink by such counsel. The counsel for the defendant in error must file with the clerk a like number of printed copies of his brief, one of which shall be signed in ink. Rule 21 does not provide for the service of briefs upon the opposite party. An exchange of briefs is required on motions to dismiss appeals or writs of error or affirm. (See Rule 6.) But it is customary and it is the better practice for counsel to exchange all briefs. Where no exchange is made, the clerk of the Supreme Court of the United States will, on application, furnish the briefs filed for the use of the opposite party.

The brief must conform to Rule 21 of the Supreme Court of the United States. For further requirements see below.

### § 22. Briefs—Number of copies.

"The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least three weeks before the case is called for argument, thirty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side."<sup>1</sup>

"The counsel for a defendant in error or an appellee shall file with the clerk thirty printed copies of his argument, at least one week before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted."<sup>2</sup>

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<sup>1</sup> § 1, Rule 21, U. S. Supreme Court.

<sup>2</sup> § 3, Rule 21, U. S. Supreme Court.

### § 23. Briefs—The contents. Subject index and alphabetical list of cases.

“The brief shall contain, in the order here stated—

“(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

“(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

“(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.”

“(4) Every brief of more than twenty pages shall contain on its front fly-leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.”<sup>1</sup>

### § 24. Specifying pages of record in brief.

Pages in the bill of exceptions printed in the transcript, where the proof, if there is any, of averment of errors may be found, must be specified in the brief as well as in the printed transcript, where pages must be cited as to where errors appear.<sup>2</sup>

### § 25. Citation of doubtful authorities.

In preparing briefs it must be remembered that general expressions in an opinion are to be taken in connection with the

<sup>1</sup> Rule 21, U. S. Supreme Court.

<sup>2</sup> Rule 21, Sup. Ct. ¶ 2, § 3; Ill. Central R. Co. v. Nelson, 212 Fed. 69, 76, 128 C. C. A. 525; Chicago, Gt. Western Ry. Co. v. Egan, 159 Fed. 40, 46; Northwestern S. B. & Mfg. Co. v. Great Lakes E. Wks., 181 Fed. 38, 45, 104 C. C. A. 52; City of Lincoln v. Sun Vapor S. L. Co., 59 Fed. 756, 8 C. C. A. 253; Orr & Lindsley Shoe Co. v. Needles, 67 Fed. 990, 995, 15 C. C. A. 142, 147.

case in which such expressions are used. If they go beyond the particular case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.<sup>1</sup>

### § 26. Where no questions of law are presented in Supreme Court.

The Supreme Court of the United States will not review a case where the record presents no question of law which would call for the exercise of the right of that court to review.<sup>2</sup>

### § 27. Specification of errors in brief.

Where there is no specification of the errors relied on in the brief of the counsel for plaintiff in error, the court will not review the case.<sup>3</sup> Errors assigned but not argued will be deemed waived.<sup>4</sup>

### § 28. Briefs stricken for scandal and impertinence.

Briefs will be stricken from the files if they are of a vituperative kind.<sup>5</sup>

### § 29. Dismissal for failure to file.

A case will be dismissed by the U. S. Supreme Court for want of an assignment of errors and of a brief such as is required by the rules of the court.<sup>6</sup>

“When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appel-

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<sup>1</sup> *Northwestern Terra Cotta Co. v. Caldwell* (C. C. A. 8th Cir.), 234 Fed. 498; *Cohens v. Virginia*, 6 Wheat. 398, 5 L. Ed. 259; *King v. Pomeroy*, 121 Fed. 287, 58 C. C. A. 209; *Traer v. Fowler*, 144 Fed. 810, 75 C. C. A. 540; *Mason City v. Wolf*, 148 Fed. 961, 78 C. C. A. 589; *Schapp v. U. S.*, 210 Fed. 853, 127 C. C. A. 415; *Joplin Mercantile Co. v. U. S.*, 213 Fed. 926, 131 C. C. A. 160. The original Federal reports should be referred to. See Rule 37 C. C. A. 2d Cir.

<sup>2</sup> *Collins v. U. S.*, 219 Fed. 673; *Stevenson v. Barbour*, 140 U. S. 48, 11 Sup. Ct. Rep. 690, 35 L. Ed. 338.

<sup>3</sup> *Collins v. U. S.*, 219 Fed. 673; *Stevenson v. Barbour*, 140 U. S. 48, 11 Sup. Ct. Rep. 690, 35 L. Ed. 338.

<sup>4</sup> *Saalfeld v. Marion Co.*, 238 Fed., (C. C. A. 6th Cir.); *Ironton v. Harrison*, 212 353 (129 C. C. A. 29.)

<sup>5</sup> *Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. Rep. 724, 59 L. Ed. 1089.

<sup>6</sup> *Benites v. Hampton*, 123 U. S. 519, 8 Sup. Ct. Rep. 254, 31 L. Ed. 260.

lee is in default, he will not be heard, except on consent of his adversary, and by request of the court."<sup>1</sup>

### § 30. Printed arguments—Briefs.

"In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but thirty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed."<sup>2</sup>

"When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel."<sup>3</sup>

"When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument."<sup>4</sup>

"No brief or argument will be received either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel."<sup>5</sup>

### § 31. Must be served.

"No brief or printed argument, required by the foregoing sections, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party."<sup>6</sup>

### § 32. Motions in Supreme Court.

(a) "All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion."<sup>7</sup>

(b) "The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be

<sup>1</sup> § 5, Rule 5.

<sup>2</sup> Sec. 1, Rule 20, U. S. Supreme Court.

<sup>3</sup> Sec. 2, Rule 20.

<sup>4</sup> Sec. 3, Rule 20, U. S. Supreme Court.

<sup>5</sup> Sec. 4, Rule 20, U. S. Supreme Court.

<sup>6</sup> § 7, Rule 20, U. S. Supreme Court.

<sup>7</sup> § 1 of Rule 6, of the Supreme Court of U. S.

made before the court shall have entered upon the hearing of a case upon the docket."<sup>1</sup>

(c) "Forty-five minutes on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins."<sup>2</sup>

(d) "All motions (in admiralty appeals) shall be made upon at least four days' notice."<sup>3</sup>

### § 33. Motions in Circuit Court of Appeals.

"(1) All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

"(2) One hour on each side (one-half hour in the Second and Seventh Circuits) shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

"(3) No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party."<sup>4</sup>

### § 34. Motions to dismiss or affirm. General practice in Supreme Court.

The practice in the Supreme Court of the United States in recent years has been to move or dismiss a cause for want of jurisdiction and to join in it a request to affirm the judgment on the ground that the appeal is utterly devoid of merit or that the points raised are foreclosed by prior decisions of the court.<sup>5</sup>

The Circuit Courts of Appeal as a rule are not in favor of dismissing appeals without consideration of the merits, except where the ground alleged is fatal to the jurisdiction of the court.<sup>6</sup>

These motions are heard on briefs only.<sup>7</sup>

<sup>1</sup> § 7, Rule 6 of the Supreme Court of U. S.

<sup>2</sup> § 2 of Rule 6 of the U. S. Supreme Court.

<sup>3</sup> Admiralty Rule XI.

<sup>4</sup> Rule XXI. C. C. A. Second Circuit.

<sup>5</sup> U. S. v. Hamburg American Line, 239 U. S. 466, 36 Sup. Ct. Rep. 212, 60 L. Ed. 387, 484; St. Louis & San Francisco R. R. Co. v. Shepherd, 240 U. S. 240, 36 Sup. Ct. Rep. 274, 60 L. Ed. 622; City of New Orleans v. Louisiana Const. Co., 129 U. S. 45, 9 Sup. Ct. Rep. 223, 32 L. Ed. 607.

<sup>6</sup> Halfpenny v. Miller, 232 Fed. 113 (C. C. A.).

<sup>7</sup> See per curiam opinion, 141 U. S. 212.

A great percentage of these motions has been sustained.<sup>1</sup>

For form of motion to dismiss and suggestions in support thereof, see Appendix.

### § 35. The Rule.

"All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in *the first instance on printed briefs or arguments*. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, as such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party."<sup>2</sup>

### § 36. When appeal taken for delay.

"The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motions as is provided for in cases of motions to dismiss under paragraph 4 of this rule."<sup>3</sup>

### § 37. Notice necessary.

No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.<sup>4</sup>

### § 38. Before record printed.

Where it appears from the motion papers which are undis-

<sup>1</sup> U. S. v. Cooke, 238 U. S. 613, 59 L. Ed. 1489; Vaughn v. South Carolina, 238 U. S. 613, 59 L. Ed. 1489; Welles v. Bryant, 238 U. S. 612, 59 L. Ed. 1489; Clarke v. Hamilton, 238 U. S. 609, 59 L. Ed. 1487; Cohen v. U. S., 238 U. S. 608, 59 L. Ed. 1486.

<sup>2</sup> § 4 of Rule 6 of Supreme Court of U. S.

<sup>3</sup> § 5 of Rule 6 of the Supreme Court of U. S.

<sup>4</sup> § 3 of Rule 6, of the Supreme Court of the U. S.



puted that the Supreme Court is without jurisdiction, the appeal or writ of error will be dismissed even before the record is printed.<sup>1</sup>

### § 39. Foreclosed by prior decisions.

Motion to dismiss under Rule 6 will be granted where the question is plainly foreclosed by prior decisions.<sup>2</sup>

### § 40. Presumption against granting motion.

Motions to dismiss appeals without consideration of the merits should not be granted, except when it clearly appears that there has been a fatal failure to comply with legal requirements.<sup>3</sup>

All doubts should be resolved in favor of retaining an appeal for decision on the merits.<sup>4</sup>

### § 41. Lack of jurisdiction apparent.

When absence of jurisdiction is apparent on the record, it is the duty of the appellate tribunal to dismiss the appeal or writ of error, even if the defendant did not raise the question in either court.<sup>5</sup>

### § 42. Time for filing record—Motion to dismiss.

A motion to dismiss for failure to file bill of exceptions, citation, and bond, must be made promptly. When the parties have entered into a stipulation as to the time for filing of the record the motion cannot be sustained.<sup>6</sup>

### § 43. Placing a cause on summary docket.

"6. Although the court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may nevertheless, if the conclusion is arrived at that the case is of such a character as not to justify extended argu-

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<sup>1</sup> *Lazarus v. Prentice*, 234 U. S. 263, 34 Sup. Ct. Rep. 851, 58 L. Ed. 1305; *St. Louis Natl. Bank v. United States Ins. Co.*, 100 U. S. 43, 25 L. Ed. 547; *Wetmore v. Rymer*, 169 U. S. 115, 8 Sup. Ct. Rep. 293, 42 L. Ed. 682.

<sup>2</sup> *Wingert v. First National Bank*, 223 U. S. 670, 32 Sup. Ct. Rep. 391, 56 L. Ed. 605.

<sup>3</sup> *Halfpenny v. Miller* (C. C. A. 4th Cir.), 232 Fed. 113.

<sup>4</sup> *Halfpenny v. Miller* (C. C. A. 4th Cir.), 232 Fed. 113.

<sup>5</sup> *Wayman-Britton Co. v. Ladd*, 231 Fed. 901 (C. C. A. 8th Cir.).

<sup>6</sup> *Fisher Hydraulic Stone & Mch. Co. v. Warner* (C. C. A. 2d Cir.), 233 Fed. 527.

ment, order the cause transferred for hearing to a summary docket. The hearing of the causes on such docket will be expedited, the court providing from time to time for such speedy disposition of the docket as the regular order of business may permit, and on the hearing of such causes one-half hour will be allowed each side for oral argument."<sup>1</sup>

#### § 44. Dismissal by consent or by appellant.

An appellant cannot as of right dismiss his own appeal. The court usually will not allow such a dismissal if appellant intends at some future time to take another appeal. Therefore, ordinarily on the dismissal of his motion, appellant is not entitled to an order expressed without prejudice.<sup>2</sup>

Case will be dismissed where same was compromised and a stipulation entered into by the parties that the suit shall be dismissed, unless plaintiff in error shows cause to the contrary within the time fixed by the court for that purpose.<sup>3</sup>

"Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court."<sup>4</sup>

#### § 45. Precedence. Advancing causes on motion.

"Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

"Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney-General.

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<sup>1</sup> § 6 of Rule 6 of Supreme Court of U. S.

<sup>2</sup> *Donallan v. Tannage Patent Co.*, 79 Fed. 385, 24 C. C. A. 647; *U. S. v. Minnesota & N. W. R. Co.*, 18 How. 241, 242, 15 L. Ed. 347; *U. S. v. Griffith*, 141 U. S. 212, 11 Sup. Ct. Rep. 1005, 35 L. Ed. 595; *Halfpenny v. Miller*, 232 Fed. 113.

<sup>3</sup> *Addington v. Adams*, 125 U. S. 693, 8 Sup. Ct. Rep. 1391, 31 L. Ed. 853.

<sup>4</sup> Rule 28, U. S. Supreme Court.

"Criminal cases may be advanced by leave of the court on motion of either party.

"All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

"No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court."<sup>1</sup>

"Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."<sup>2</sup>

Under Rule 32 of the Rules of Practice of the Supreme Court of the United States, cases brought to the Supreme Court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions, writs of error and appeals.

#### § 46. Advancing habeas corpus case.

When a writ of habeas corpus is issued the cause will be advanced in the United States Supreme Court.<sup>3</sup>

#### § 47. Use of law library.

"1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

"2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

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<sup>1</sup> Rule 26, U. S. Supreme Court.

<sup>2</sup> 36 Stat. L. 1160. This section is a reenactment, without change, of R. S., Sec. 710, 4 Fed. Stat. Annot. 490.

<sup>3</sup> *Storti v. Mass.*, 183 U. S. 138, 22 Sup. Ct. Rep. 72, 46 L. Ed. 120; *Ex parte Gytel*, 210 Fed. 918.

"3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court."<sup>1</sup>

### § 48. Hearing of the cause.

"1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall be continued to the next term of the court unless some good and satisfactory reason to the contrary shall be shown to the court.

"2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued."<sup>2</sup>

"The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment."<sup>3</sup>

### § 49. Consolidation of actions for hearing.

The Supreme Court may of its own motion or on motion of a party consolidate for hearing causes of a like nature or relative to the same questions, where it appears reasonable to do so.<sup>4</sup>

"Two or more cases, involving the same question, may, by the leave of the court be heard together, but they must be argued as one case."<sup>5</sup>

### § 50. Passing and reinstating cause.

"If, after a case has been passed, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to

<sup>1</sup> Rule 7, U. S. Supreme Court.

<sup>2</sup> Rule 26, U. S. Supreme Court.

<sup>3</sup> Rule 27, U. S. Supreme Court.

<sup>4</sup> *Ætna Ins. Co. v. Moore*, 231 U. S. 543, 34 Sup. Ct. Rep. 186, 58 L. Ed. 356; *U. S. v. Terminal R. R. Ass'n*, 236 U. S. 194, 35 Sup. Ct. Rep. 408, 59 L. Ed. 535.

<sup>5</sup> § 8, Rule 26, U. S. Supreme Court.

be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct."<sup>1</sup>

"No stipulation to pass a case will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court."<sup>2</sup>

## § 51. Oral arguments.

"1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

"2. Only two counsel will be heard for each party on the argument of a case.

"3. One and one-half hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. But in cases certified from the Circuit Courts of Appeals, cases involving solely the jurisdiction of the court below, and cases under the Act of March 2, 1907, 34 Stat., 1246, forty-five minutes only on each side will be allowed for the argument unless the time be extended. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments."<sup>3</sup>

"6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party."<sup>4</sup>

## § 52. Effect of failure to appear or file brief.

(a) "Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant in error or appellee may have the plaintiff in error or appellant called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance."<sup>5</sup>

(b) "Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case."<sup>6</sup>

(c) "When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant."<sup>7</sup>

(d) "When a case is called for argument at two successive terms, and upon

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<sup>1</sup> § 9, Rule 26, U. S. Supreme Court.

<sup>2</sup> Rule 22, U. S. Supreme Court.

<sup>3</sup> Rule 16, U. S. Supreme Court.

<sup>7</sup> Rule 18, U. S. Supreme Court.

<sup>2</sup> § 10, Rule 26, U. S. Supreme Court.

<sup>4</sup> Rule 21, U. S. Supreme Court.

<sup>6</sup> Rule 17, U. S. Supreme Court.

the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement."<sup>1</sup>

### § 53. Rehearing. Time for petition.

"A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, *and be supported by certificate of counsel*; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it and a majority of the court so determines."<sup>2</sup>

Rehearing will not be entertained after term.<sup>3</sup>

### § 54. Effect of order staying mandate.

An order staying a mandate retains the jurisdiction of the appellate tribunal for the purposes of a rehearing.<sup>4</sup>

### § 55. In criminal cases—Rehearing by Government.

The government may petition for rehearing in a criminal case where the judgment of conviction is reversed.<sup>5</sup>

Although generally the government cannot appeal or sue out a writ of error from judgments of acquittal.<sup>6</sup>

### § 56. Interest.

(a) "In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered."<sup>7</sup>

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<sup>1</sup> Rule 19, U. S. Supreme Court.

<sup>2</sup> Rule 30, U. S. Supreme Court. (Rule 29 of the Court of Appeals is identical with the above.)

<sup>3</sup> Omaha Elect. L. & P. Co. v. City of Omaha, 216 Fed. 848; Bushnell v. Crooke Mining & Smelting Co., 150 U. S. 82, 14 Sup. Ct. Rep. 2, 37 L. Ed. 1007, 63 Fed. 182, 68 Fed. 837.

<sup>4</sup> BURGEL v. ROBINSON, 123 Fed. 262, 59 C. C. A. 260; Omaha Elect. Light & Power Co. v. City of Omaha, 216 Fed. 850.

<sup>5</sup> RYAN v. U. S., 216 Fed. (C. C. A.); MITCHELL v. U. S. (C. C. A. 9th Cir.), 197 Fed. 15; DRAKE v. STATE, 29 Tex. App. 265, 15 S. W. 725; STATE v. JONES, 64 Ia. 849.

<sup>6</sup> Ex parte JIM HONG, 211 Fed. 73; U. S. v. LANGES, 144 U. S. 310, 12 Sup. Ct. Rep. 609, 36 L. Ed. 445.

<sup>7</sup> § 1, Rule 23, U. S. Supreme Court.

(b) "The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."<sup>1</sup>

(c) "In cases in admiralty, damages and interest may be allowed if specially directed by the court."

Clause 4, Supreme Court Rule 23, as amended March 10, 1890, and of C. C. A. Rule 30, in all circuits, except the 7th Circuit.

### § 57. Costs.

(a) "In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal shall be for want of jurisdiction, when the cost incident to the motion to dismiss shall be allowed."<sup>2</sup>

Where a suit is dismissed for want of jurisdiction, the court below has no power to award costs to the defendants.<sup>3</sup>

(b) "In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

(c) "In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case."

(d) "Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

(e) "When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail."<sup>4</sup>

(f) "The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of Sections 238, 239, 240, and 241 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March 3, 1911, Chapter 231."<sup>5</sup>

### § 58. Damages for delay on affirmance in error.

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a Circuit Court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."<sup>6</sup>

<sup>1</sup> § 3, Rule 23, U. S. Supreme Court.

<sup>2</sup> § 1, Rule 24, U. S. Supreme Court.

<sup>3</sup> *Weyman-Bruton Co. v. Ladd* (C. C. A. 8th Cir.), 231 Fed. 898.

<sup>4</sup> Rule 24, U. S. Supreme Court.

<sup>5</sup> Rule 38, U. S. Supreme Court.

<sup>6</sup> Rev. Stats., Sec. 1010.

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."<sup>1</sup>

Where on appeal from a judgment in a negligence action, the Circuit Court of Appeals affirmed the judgment and then a further appeal is taken to the Supreme Court and no substantial question of law is raised, the Supreme Court has power to affirm the judgment and add thereto 10% damages.<sup>2</sup>

### § 59. Opinions and mandates. Opinions of the court.

"1. All opinions delivered by the court, shall immediately upon the delivery thereof, be handed to the clerk to be printed. And it shall be the duty of the clerk to cause the same to be forthwith printed, and to deliver a copy to the reporter as soon as the same shall be printed.

"2. The original opinions of the court shall be filed with the clerk of this court for preservation.

"3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded."<sup>3</sup>

### § 60. When mandates issue.

"Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term."<sup>4</sup>

"In all cases finally determined by this Court, a mandate or other proper process in the nature of procedendo shall be issued, on the order of this Court, to the Court below, for the purpose of informing such Court of the proceedings in this Court so that further proceedings may be had in such Court as to law and justice may appertain."<sup>5</sup>

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<sup>1</sup> § 2 of Rule 23 of the Supreme Court.

<sup>2</sup> *Texas & Pacific R. R. Co. v. Prater*, 229 U. S. 177, 33 Sup. Ct. Rep. 637, 57 L. Ed. 1139; *Gibbs v. Diekma*, 102 U. S. 410, 26 L. Ed. 177.

<sup>3</sup> Rule 25, U. S. Supreme Court.

<sup>4</sup> Rule 39, U. S. Supreme Court.

<sup>5</sup> Rule 32 of the U. S. Circuit Court of Appeals, for 2d Circuit.



In the Second Circuit there is also an admiralty rule as to mandate.

"The decrees of this court shall direct that a mandate issue to the court below."<sup>1</sup>

"In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain."<sup>2</sup>

### § 61. Recalling mandate.

After the decision on appeal and the remanding of the case to the trial court, a bill of review may be filed on the ground of newly discovered evidence. In order to prevent a conflict of jurisdiction, however, it is necessary to first obtain the consent of the appellate court whose judgment is to be reviewed.<sup>3</sup>

In such a case, the decree sought to be set aside by the bill of review, in the court below, is entered in pursuance of the mandate of the appellate court. It is therefore the decree of that court, and not that primarily entered by the court below, that is sought to be interfered with.<sup>4</sup>

In making application for bill of review, leave must first be obtained from the appellate tribunal. After leave has been obtained and the court below proceeds to correct the judgment or decree, the party who feels aggrieved at such amendment or correction may appeal, and the appellate court then has jurisdiction to make any further corrections or amendments.<sup>5</sup>

It is discretionary with the appellate court to allow the peti-

<sup>1</sup> Admiralty Rule XVI.

<sup>2</sup> § 5, Rule 24, U. S. Supreme Court.

<sup>3</sup> *Wagner v. Meccans*, 235 Fed. 890 (C. C. A.); *Keith v. Alger*, 124 Fed. 32, 59 C. C. A. 552; *Omaha Elect. L. & P. Co. v. City of Omaha*, 216 Fed. 848.

<sup>4</sup> *Keith v. Alger*, 124 Fed. 32, 59 C. C. A. 552; *Southard v. Russel*, 16 How. 547, 14 L. Ed. 1052; *Omaha Elect. L. & P. Co. v. City of Omaha*, supra; *In re Brown*, 213 Fed. 701.

<sup>5</sup> *Wagner v. Meccans*, supra, and cases cited; *Castell v. Faber*, 166 Fed. 281 (C. C.A.).

tion, and the rule generally followed is: If, upon the case made, the court is of the opinion that the decree which it has directed to be entered in the District Court ought to be reopened and reviewed in that court, the appellate court will release the lower court from its obligation to observe the mandate to the extent of allowing it to entertain the application and decide upon the merits, but not otherwise. The decree entered upon direction of the appellate court, though in form it is the decree of the lower court, yet it is in substance its own decree, and it ought not for light reasons allow it to be disturbed. The petition for leave should therefore be addressed to the appellate court in order that it may consider it fully.<sup>1</sup>

The district court or court of original jurisdiction has no jurisdiction to entertain or pass upon the petition for leave to file a bill of review.<sup>2</sup>

After a mandate has come down and has been filed in the court below an application to amend the record, not because of clerical errors or some other mistake in the record, but for affirmative relief, such motion will not be granted. The Supreme Court of the United States affirmed such action of the court saying that it knew of no precedent for such action.<sup>3</sup>

### § 62. Power of court to amend its own judgments.

A court may possibly not have the power to alter or vacate its own judgments truly recorded, after the term in which it was entered. But that any misprision, omission, or mistake of the clerk may be amended *at any time*, where the record shows anything to amend by, has never been doubted since the statute of 1 Edward III., C. 6. It is a power vested in every court, and one which it is their duty to exercise in a proper case. It is a

<sup>1</sup> *Wagner v. Meccans*, supra; *Novelty Tufting Mach. Co. v. Buser*, 158 Fed. 83 (C. C. A.); *Sheeler v. Alexander*, 211 Fed. 544.

<sup>2</sup> *In re Gamewell Fire Alarm Tel. Co.*, 73 Fed. 908 (C. C. A.); *Sheeler v. Alexander*, 211 Fed. 544.

<sup>3</sup> *Hickman v. Fort Scott*, 141 U. S. 415, 12 Sup. Ct. Rep. 9, 35 L. Ed. 775; *In re National Tel. Co.*, 230 Fed. 785.

power committed to the discretion of the court, to be exercised over their own records, and the correct use of that discretion cannot be questioned by another court, even on a writ of error.<sup>1</sup>

Likewise where fraud or the like has been perpetrated on a court of equity in rendering its decree it may be set aside after term. During the term it may correct or amend or modify its own judgment or decree,<sup>2</sup> but after term the Court loses jurisdiction.

### § 63. Bill of review for errors of law not entertained.

A bill of review will not be for errors of law alleged on the face of the decree after the judgment of appellate court.<sup>3</sup>

### § 64. General provisions—Attorneys and Counsellors.

"1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the States to which they respectively belong, and that their private and professional characters shall appear to be fair.

"2. They shall respectively take and subscribe the following oath or affirmation, viz.:

"I, \_\_\_\_\_, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States."<sup>4</sup>

"No clerk or assistant or deputy clerk, of any territorial, district, or circuit court of appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of the said courts, or in any district for which he is acting as such officer."<sup>5</sup>

"Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the

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<sup>1</sup> *Wetmore v. Kerrick*, 205 U. S. 141, 153, 51 L. Ed. 745, 21 Sup. Ct. Rep. 434; *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr. 569, 586; *In re Wight*, Petitioner, 134 U. S., 136, 10 Sup. Ct. Rep. 487, 33 L. Ed. 865; *In re National Telephone Co.*, 230 Fed. 785.

<sup>2</sup> *Feiberg v. Warren*, 192 Fed. 458 (C. C. A. 9th Cir.); *U. S. v. Mayer*, 235 U. S. 55; *Doss v. Tyack, et al.*, 14 How. 297, 14 L. Ed. 428; *Bassett v. United States*, 9 Wall. 38, 19 L. Ed. 548; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Nelson v. Meehan*, 155 Fed. 1, 4; *In re National Telephone Co.*, supra.

<sup>3</sup> *Omaha Electric Light Co. v. City of Omaha*, 216 Fed. 850 (C. C. A.); *Southard v. Russell*, 16 How. (U. S.) 547, 14 L. Ed. 1052.

<sup>4</sup> Rule 2, U. S. Supreme Court.

<sup>5</sup> § 273, Federal Judicial Code.

case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office."<sup>1</sup>

"In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."<sup>2</sup>

### § 65. Process.

"1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

"2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

"3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*."<sup>3</sup>

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<sup>1</sup> § 274, Federal Judicial Code.

<sup>2</sup> § 272, Federal Judicial Code.

<sup>3</sup> Rule 5, U. S. Supreme Court.

THE END

For Federal Forms see Appendix.

**PART II**

**JURISDICTION AND PROCEDURE IN THE APPELLATE  
COURTS OF THE STATE OF NEW YORK**



## CHAPTER I

## Jurisdiction of the Appellate Courts of the State of New York

- | Sec.  | Sec.   |
|---|--|
| 1. Mode of obtaining review. Appeal only.   | Court—appellant may. Respondent cannot without cross-appeal. |
| 2. Decisions reviewable.<br>(a) Real controversy must exist. No moot questions.<br>(b) Exceptions to this rule: injunctions, election cases, questions of constitutionality of statute. | 13. What constitutes reversible error—harmless error.        |
| 3. Orders, judgments, or decrees only appealable.   | 14. No reversal for nominal damages.                         |
| 4. Judgments or orders on consent or default not appealable.  | 15. Erroneous admission of evidence in equity.               |
| 5. Who may appeal.  | 16. Saving questions for review—necessity of exceptions.     |
| 6. When persons not parties to the record may appeal.   | 17. Rulings on evidence, how preserved.                      |
| 7. Death of a party—substitution of representative.   | 18. Motions to dismiss or to direct verdict—when made.       |
| 8. Procedure if no substitution made.   | 19. When motion to submit to jury should be made.            |
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## § 1. Mode of obtaining review. Appeal only.

The only mode of obtaining a review in the courts of the State of New York is by appeal. The practice of reviewing by writ of error in a civil action or special proceeding has been abolished.<sup>1</sup>

When an appeal is taken, the party or person appealing is designated as the appellant and the adverse party as the respondent. After an appeal is taken to another court, the name of

<sup>1</sup> Sec. 1293, Code Civ. Proc.

the appellate court must be substituted for the name of court below in the title of the action or special proceeding, and in any case the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed in consequence of the appeal.

**§ 2. Decisions reviewable. Moot cases.**

(a) An appellate court will determine an appeal only if it presents an actually existing controversy between the parties.<sup>1</sup>

If, during the pendency of the appeal, the controversy between the parties, by reason of the occurrence of extrinsic events, has become moot or academic, the appellate tribunal will decline to express its opinion in the case and will dismiss the appeal.<sup>2</sup>

(b) Where the decision in the pending action would be res adjudicata in another proceeding, the appellate court may consider the appeal even though it may thereby pass upon a mere abstract proposition of law or fact. Thus the courts have determined appeals from judgments in actions for an injunction even where the question involved has become purely academic, but where such a decision would determine the defendant's liability on an undertaking given upon the granting of a preliminary injunction.<sup>3</sup>

In cases of public importance, the courts, for future guidance, have frequently passed upon an election controversy, even though the question in the particular case has become academic, as where the election had taken place before the appeal was heard or decided.<sup>4</sup>

This doctrine has at times been applied to other cases, as where the constitutionality of a statute of public importance was involved.<sup>5</sup>

<sup>1</sup> *Delavan v. N. Y., New Haven, and Hartford Railroad Co.*, 216 N. Y. 359.

<sup>2</sup> *Delavan v. N. Y., N. H., and Hartford Railroad Co.*, 216 N. Y. 359; *Croker v. Sturgis*, 175 N. Y. 158, 67 N. E. 307; *Matter of Davis*, 168 N. Y. 89, 61 N. E. 118.

<sup>3</sup> *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57.

<sup>4</sup> *Matter of Cuddeback*, 3 App. Div. 103, 39 Supp. 388.

<sup>5</sup> *Commonwealth of Mass. v. Klaus*, 145 App. Div. 798, 130 Supp. 713.



**§ 3. Orders, judgments, or decrees only appealable.**

An appeal may be taken only from an order, or a judgment or decree. No appeal lies from a decision or a finding, but on an appeal from a judgment or decree, the decision or findings on which it is based may be reviewed.<sup>1</sup>

**§ 4. Judgments or orders on consent or default not appealable.**

A judgment or order rendered by default cannot be appealed from by the party in default.<sup>2</sup> No appeal lies from a judgment or order entered on the consent or the motion of the party seeking to appeal therefrom.<sup>3</sup>

**§ 5. Who may appeal.**

Only a party aggrieved by the judgment or order may appeal.<sup>4</sup> A party that is not aggrieved has no standing to take an appeal. Thus a person cannot appeal merely because the judgment is not as favorable to the adverse party as it should be.<sup>5</sup>

**§ 6. When persons not parties to the record may appeal.**

A person who is not a party to the action or proceeding ordinarily cannot take an appeal,<sup>6</sup> unless he is entitled by law to be substituted for a party and is thereafter so substituted.<sup>7</sup> There are, however, certain exceptions to this rule. Thus, sureties on an undertaking on injunction have a right to appeal from a report as to damages opposed by them.<sup>8</sup> Again, where an attachment has been levied against the defendant's property, a person who has acquired a lien upon or interest in the property after it was

<sup>1</sup> *Gabay v. Doane*, 66 App. Div. 507, 73 Supp. 381; *Stevens v. Central Nat. Bank*, 162 N. Y. 253, 56 N. E. 628.

<sup>2</sup> Code Civ. Pro., § 1294; *Henderson, Hull & Co. v. McNally*, 48 App. Div. 134, 62 Supp. 582, affd. 168 N. Y. 646; *Loper v. Wading River Realty Co.*, 143 App. Div. 167, 127 Supp. 1000.

<sup>3</sup> *Brown v. McKie*, 185 N. Y. 303, 78 N. E. 64; *Alleva v. Hagerty*, 32 Misc. 711, 65 Supp. 690; *Oppenheimer v. Demuth Glass Mfg. Co.*, 56 Misc. 459, 107 Supp. 29.

<sup>4</sup> Code Civ. Pro., § 1294; *Isham v. N. Y. Ass'n for Improving the Condition of the Poor*, 177 N. Y. 218, 69 N. E. 367.

<sup>5</sup> *Sadlier v. City of New York*, 185 N. Y. 408, 78 N. E. 272.

<sup>6</sup> *People ex rel. Turner v. Sanborn*, 46 App. Div. 630, 61 Supp. 529.

<sup>7</sup> Code Civ. Pro., § 1296.

<sup>8</sup> *Hotchkiss v. Platt*, 7 Hun. 56, affd. 66 N. Y. 620.

attached, may make a motion to vacate or modify the warrant, and it necessarily follows that if his motion is denied, he may appeal from the order of denial.<sup>1</sup> The third party in proceedings supplementary to execution may appeal from an order requiring him to pay over a fund to the judgment creditor.<sup>2</sup>

### § 7. Death of a party—substitution of representative.

Where the adverse party dies, an appeal can be taken as if he was living. But it cannot be heard until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent.<sup>3</sup>

Where either party to an appeal dies before it is heard, his successor in interest must be substituted in his place. In either of the foregoing instances, the application for an order substituting the successor in interest must be made to the appellate court, and not to the court from which the appeal is taken.<sup>4</sup> Such an order may be made not only on the application of the successor in interest or of the surviving co-plaintiff or co-defendant, but also on the application of a surviving adverse party.<sup>5</sup>

### § 8. Procedure, if no substitution made.

If a party dies during the pendency of the appeal, and his successor in interest is not substituted within three months thereafter, the appellate court may make an order requiring all persons interested in the decedent's estate to show cause why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The return day of the order must be not less than six months after the day on which the order is granted. Upon the return day or at a subsequent day appointed by the court, if the proper person has not been substituted, the court may reverse or affirm the judgment or order appealed from or dismiss the appeal.<sup>6</sup>

<sup>1</sup> Code Civ. Pro., § 682.

<sup>2</sup> *Locke v. Mabbett*, 3 Abb. Ct. App. Dec. 61.

<sup>3</sup> Code Civ. Pro., § 1297.

<sup>4</sup> Code Civ. Pro., § 1299.

<sup>5</sup> *Reed v. Farrand*, 198 N. Y. 207, 91 N. E. 541.

<sup>6</sup> Code Civ. Pro., § 1298.

**§ 9. Substitution of assignee of interest.**

If one of the parties assigns his interest, the action or proceeding may be continued in the name of the original party. But the court may direct the assignee to be substituted or joined with the original party, as the case requires.<sup>1</sup>

**§ 10. Status of attorneys after judgment. Notice of appeal served on attorney in court below.**

Inasmuch as an attorney's authority terminates when the judgment is entered, any party may retain a new attorney for the purpose of taking an appeal, and no order of substitution is necessary. But unless a new attorney is actually retained, the authority of the former attorney is deemed to continue.<sup>2</sup> Thus the notice of appeal may be served on the person who was the attorney for the successful party in the court below.<sup>3</sup>

**§ 11. When right to appeal waived.**

Where a party accepts the benefit of one part of an order or judgment, as a general rule he thereby waives his right to appeal, if the part that he accepts is not independent of the part from which he desires to appeal. Thus if a party avails itself of permission to plead over, his appeal from the order or judgment overruling the demurrer will be dismissed.<sup>4</sup> Where judgment is directed for the plaintiff on the ground that the answer is sham, and the defendant obtains leave to serve an amended answer, he is thereby precluded from appealing from the original order.<sup>5</sup> By acceptance of costs imposed as a condition of granting an order, the party accepting them waives his right to appeal from the order.<sup>6</sup>

<sup>1</sup> Code Civ. Pro., § 756.

<sup>2</sup> *Magnolia Metal Co. v. Sterlingworth R. Supply Co.*, 37 App. Div. 366, 56 Supp. 16.

<sup>3</sup> Code Civ. Pro., § 1300; Rule III. of the Rules of Practice of the Court of Appeals.

<sup>4</sup> *Keepers v. Hartley Co.*, 150 App. Div. 252, 134 Supp. 896.

<sup>5</sup> *Sun Printing & Pub. Assn. v. Abbey Effervescent Salt Co.*, 62 App. Div. 54, 70 Supp. 871.

<sup>6</sup> *Silver & Co. v. Waterman*, 127 App. Div. 339, 111 Supp. 546; *Serrell v. Forbes*, 106 App. Div. 482, 94 Supp. 805, *affd.* 185 N. Y. 572.

On the other hand, the unsuccessful party does not waive his right to appeal, by paying the judgment.<sup>1</sup> In the same way, the plaintiff who has recovered judgment for less than the amount demanded is not precluded by entering the judgment and issuing execution, from appealing on the ground that it was not for a sufficient amount.<sup>2</sup> Similarly, in condemnation proceedings, by accepting an award, the landowner does not waive his right to appeal upon the ground of the insufficiency of the award.<sup>3</sup>

**§ 12. Who may urge error in appellate court—appellant may. Respondent cannot without cross-appeal.**

Ordinarily, only the appellant may raise questions for review, and a respondent, who has not taken a cross-appeal, may not attack the judgment for any errors adverse to him, and cannot claim that it should be reversed or modified.<sup>4</sup> Neither can a party complain of an error that was favorable to him or prejudicial to the adverse party.<sup>5</sup>

**§ 13. What constitutes reversible error—harmless error.**

Technical errors or defects not affecting the substantial rights of the parties will not be regarded by the appellate tribunal.<sup>6</sup>

An error which could not have harmed the appellant is not ground for reversal, as for instance where certain evidence is improperly excluded, but the fact sought to be proved is otherwise established<sup>7</sup>; where evidence is improperly admitted, but the

<sup>1</sup> MacEvitt v. Maass, 64 App. Div. 382, 72 Supp. 158.

<sup>2</sup> Goepel v. Kurtz Action Co., 216 N. Y. 343; New Rochelle Gas & Fuel Co. v. Van Benschoten, 47 App. Div. 477, 62 Supp. 398.

<sup>3</sup> Matter of New York (Court House), 216 N. Y. 489.

<sup>4</sup> Matter of Langslow, 167 N. Y. 314, 60 N. E. 590; North v. Peoples Bk., 147 App. Div. 203, 131 Supp. 911; Laforge v. McGee, 127 App. Div. 143, 111 Supp. 288; Jennings v. Supreme Council, 81 App. Div. 76, 81 Supp. 90; Burns v. Burns, 109 App. Div. 98, 95 Supp. 797, affd. 190 N. Y. 211, 82 N. E. 1107.

<sup>5</sup> Rockefeller v. Lamora, 106 App. Div. 345, 94 Supp. 549; Young Brothers Feed Co. v. Seymour, 151 App. Div. 549, 136 Supp. 80; Kroder v. Interurban St. Ry. Co., 46 Misc. 118, 91 Supp. 341.

<sup>6</sup> Code Civ. Pro., § 1317; Matter of Farley, 217 N. Y. 613.

<sup>7</sup> Scott v. Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 Supp. 1016; Dupre v. Childs, 52 App. Div. 306, 65 Supp. 179, affd. 169 N. Y. 585.

same facts are established by other competent evidence and the appellate court is satisfied that the verdict would have been the same if the error had not been committed<sup>1</sup>; or if evidence is improperly admitted on a point which is not controverted.<sup>2</sup>

**§ 14. No reversal for nominal damages.**

An appellate court will not reverse a judgment dismissing the complaint merely for the purpose of permitting a recovery of nominal damages,<sup>3</sup> unless the judgment of dismissal may defeat or prejudice a substantial right in controversy.<sup>4</sup>

**§ 15. Erroneous admission of evidence in equity.**

In equity cases, erroneous admission of evidence is not ground of reversal, unless it appears that it prejudiced the appellant and the trial court or referee was affected by it.<sup>5</sup>

**§ 16. Saving questions for review—necessity of exceptions.**

Ordinarily, the appellant cannot claim an erroneous ruling on a question of law as a ground of reversal, unless an exception was duly taken in the trial court.<sup>6</sup> No exceptions are necessary to secure a review of questions of fact.<sup>7</sup> However, the Appellate Division, unlike the Court of Appeals, may in its discretion reverse even in the absence of exceptions, if the error reaches the valid substance of a fair trial or if grave injustice has been done.<sup>8</sup>

<sup>1</sup> Carley v. N. Y. Ontario, etc., R. Co., 16 N. Y. State Rep. 307, 1 Supp. 63; Kilmer v. Quackenbush, 125 App. Div. 352, 109 Supp. 444.

<sup>2</sup> Braun v. Hathran, 87 App. Div. 611, 84 Supp. 8; Radin v. Paul, 90 N. Y. Supp. 1072.

<sup>3</sup> Hopedale Electric Co. v. Electric Storage Battery Co., 184 N. Y. 356, 77 N. E. 394; Willson v. Faxon, Williams, etc., 138 App. Div. 366, 122 Supp. 783; Lynch v. N. Y. Times Co., 171 App. Div. 399, 157 Supp. 392.

<sup>4</sup> Rollins v. Bowman Cycle Co., 96 App. Div. 365, 89 Supp. 289.

<sup>5</sup> Prime v. City of Yonkers, 131 App. Div. 110, 115, 115 Supp. 305, *affd.* 199, 542; McSorley v. Hughes, 58 Hun. 360, 12 Supp. 179, *affd.* 129 N. Y. 695.

<sup>6</sup> Wangner v. Grimm, 169 N. Y. 421, 62 N. E. 569.

<sup>7</sup> See Part II, Chap. III., § 8.

<sup>8</sup> Smith v. Long Island R. R., 129 App. Div. 427, 114 Supp. 228; McGrath v. Home Ins. Co., 88 App. Div. 153, 84 Supp. 374; Byrne v. Gillies Co., 144 App. Div. 677, 129 Supp. 602.

**§ 17. Rulings on evidence, how preserved.**

An error in the admission or exclusion of evidence is ordinarily available on appeal only if a proper objection was made and exception taken at the time.<sup>1</sup>

The objection to a question must not be general, but must point out wherein the evidence is inadmissible. Thus if it is the form of the question that is objected to, that fact must be stated at the time the objection is taken.<sup>2</sup> If it is claimed that a hypothetical question embraces facts not proven, attention must be called to that point in the objection to the question.<sup>3</sup> So, if it is claimed that no proper foundation has been laid for the testimony, that fact must be specifically pointed out in the objection.<sup>4</sup> If it is urged that the evidence is rendered inadmissible by §§ 829 or 834 of the Code of Civil Procedure, that point must be made specifically in the objection.<sup>5</sup>

If the evidence is inadmissible on one ground and is objected to on another ground, the objection is insufficient.<sup>6</sup>

In order to raise a foundation for a claim that testimony was improperly excluded, it is the better and safer practice to put the witness on the stand and ask him a question seeking to bring out the contested evidence, and then to take an exception to the ruling sustaining an objection to the question. However, it has been held that if the party, instead of going through the formality of calling the witness and asking a question, makes an offer of proof, the judge rules that he will not take the evidence, and an exception is taken, sufficient foundation is made for raising the point on

<sup>1</sup> *Leahy v. Campbell*, 70 App. Div. 127, 75 Supp. 72; *Newmeyer v. Hooker*, 131 App. Div. 592, aff. 199 N. Y., 591; *Seidenspinner v. Metropolitan Life Ins. Co.* 175 N. Y. 95, 67 N. E. 123; *Smith v. Nassau El. R. Co.*, 57 App. Div. 152, 67 Supp. 1044.

<sup>2</sup> *Weinhandler v. Eastern Brewing Co.*, 46 Misc. 584, 92 Supp. 792.

<sup>3</sup> *Muller v. Met. St. R. Co.*, 77 App. Div. 221, 78 Supp. 1069, affd. 177 N. Y. 565; *Mount v. Brooklyn Union Gas Co.*, 72 App. Div. 440, 76 Supp. 533.

<sup>4</sup> *Wightman v. Campbell*, 217 N. Y. 479.

<sup>5</sup> *Hamlin v. Hamlin*, 117 App. Div. 493; *Deutschmann v. Third Ave. R. Co.*, 87 App. Div. 503, 84 Supp. 887.

<sup>6</sup> *M. Groh's Sons v. Groh*, 177 N. Y. 8, 68 N. E. 992.

appeal, if no objection is made to such informal procedure, either by court or counsel.<sup>1</sup>

### § 18. Motions to dismiss or to direct verdict—when made.

In order to support a claim, in a jury case, that no question of fact was presented for the decision of the jury, a motion should be made to dismiss the complaint at the close of the plaintiff's case, and at the close of the entire case either that motion should be renewed or else a motion for a directed verdict should be made.<sup>2</sup>

If both sides move for a direction of the verdict, without requesting to go to the jury if the motion is denied, it is tantamount to a consent that all questions be determined by the court, and the defeated party may not afterward claim that the case should have been submitted to the jury.<sup>3</sup>

### § 19. When motion to submit to jury should be made.

In order to raise the point that the case should have been submitted to the jury instead of a verdict being directed, it is the safer practice to make a motion specifically that questions be submitted to the jury,<sup>4</sup> although the authorities are not at unison upon this point.<sup>5</sup>

### § 20. Motion to dismiss complaint.

A motion to dismiss the complaint should specify the defects claimed to exist.<sup>6</sup>

<sup>1</sup> *Wills v. Venus Silk Glove Mfg. Co.*, 170 App. Div. 352, 156 Supp. 115; *Corri-gan v. Funk*, 109 App. Div. 846, 96 Supp. 910.

<sup>2</sup> *Viele v. Mack Paving Co.*, 150 App. Div. 839, 135 Supp. 147; *Seeman v. Levine*, 205 N. Y. 514, 99 N. E. 158; *Wangner v. Grimm*, 169 N. Y. 421, 62 N. E. 569; *Biogioni v. Eglee Bunting Co.*, 112 App. Div. 338, 98 Supp. 591.

<sup>3</sup> *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 Supp. 45, *affd.* 165 N. Y. 666; *Lyman v. Mead*, 56 App. Div. 582, 67 Supp. 254; *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *Veeder v. Seaton*, 85 App. Div. 196, 83 Supp. 159; *Marus v. Central R. Co. of N. J.*, 161 Supp. 546.

<sup>4</sup> *Ranken v. Donovan*, 46 App. Div. 225, 61 Supp. 542, *affd.* 166 N. Y. 626.

<sup>5</sup> See, for instance, *Pneumatic Signal Co. v. Texas & Pacific R. Co.*, 200 N. Y. 125, 93 N. E. 471.

<sup>6</sup> *Gilbert v. City of New York*, 173 App. Div. 9, 159 Supp. 460; *Bloomquist v. Farson*, 170 App. Div. 64, 156 Supp. 47; *Hubert v. Jose*, 148 App. Div. 718, 132 Supp. 811; *Nilsson v. De Haven*, 47 App. Div. 537, 62 Supp. 506.

**§ 21. Exceptions to judge's charge must be specific.**

In order to present to the appellate tribunal the question that a portion or portions of the judge's charge were erroneous, it must appear that an exception was duly taken at the trial. It is not sufficient to except to the charge generally, unless every part of the charge is erroneous, but it is necessary to except specifically to such parts of the charge as are claimed to be incorrect.<sup>1</sup> It was held otherwise in a case where the charge submitted only two questions, and the instructions were erroneous as to both.<sup>2</sup>

It is not essential to repeat verbatim the language excepted to, but it is sufficient if the objectionable part is pointed out with such accuracy that there can be no misunderstanding as to what portion of the charge is referred to.<sup>3</sup>

**§ 22. Requests to charge must be made.**

In order to present the question that certain instructions should have been given to the jury, it is necessary to present to the trial judge requests to charge, embodying such instructions, and if they are denied, exceptions should be taken to the refusal to charge. A separate exception should be taken to each refusal to charge, since a single exception to a refusal to charge several propositions is untenable, if any one of the proposed instructions is incorrect.<sup>4</sup>

**§ 23. Exceptions to charge must be taken before verdict.**

Exceptions to the charge and to the refusals to charge may be taken at any time before the jury has rendered its verdict.<sup>5</sup> But any attempt to take exceptions after the rendition of the verdict is unavailing.<sup>6</sup>

<sup>1</sup> Haggart v. Morgan, 5 N. Y. 422; Jones v. Osgood, 6 N. Y. 233; Caldwell v. Murphy, 11 N. Y. 416; O'Leary v. Walter, 50 N. Y. 683; White v. McLean, 57 N. Y. 670; Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861.

<sup>2</sup> Schenck v. Andrews, 57 N. Y. 133.

<sup>3</sup> People ex rel. Dailey v. Livingston, 79 N. Y. 279.

<sup>4</sup> Magee v. Badger, 34 N. Y., 247; Walsh v. Kelly, 40 N. Y. 556; Patton v. Royal Baking Powder, 114 N. Y. 1, 20 N. E. 621.

<sup>5</sup> Code Civ. Pro., § 995; Polykranas v. Krausz, 73 App. Div. 583, 77 Supp. 46.

<sup>6</sup> Banker v. Fisher, 27 N. Y. State Rep. 953.



**§ 24. Time to appeal cannot be extended.**

The time to take an appeal from any judgment or order cannot be extended either by consent or order of the court.<sup>1</sup>

**§ 25. Imperfect service of notice does not vitiate appeal.**

The court to which an appeal is taken may allow the service of the notice of appeal either on the clerk of the court or on the attorney for the respondent after the expiration of the time to appeal, if the notice of appeal was served on one of them in due time, but service on the other was inadvertently overlooked.<sup>2</sup>

**§ 26. Notice of appeal and undertaking may be amended.**

The court may also permit the amendment of the notice of appeal after the time to appeal has expired. In one case, the Appellate Division of the First Department went as far as to permit the notice of appeal to be amended by changing the name of the court to which the appeal was taken.<sup>3</sup> Similarly, an amendment of the undertaking on appeal may be permitted.<sup>4</sup>

<sup>1</sup> Code Civ. Pro., § 784.

<sup>2</sup> Code Civ. Pro., § 1303; *Waldo v. Schmidt*, 200 N. Y. 199, 93 N. E. 477; *Vose v. Conkling*, 159 App. Div. 201, 137 Supp. 1066.

<sup>3</sup> *Vose v. Conkling*, 159 App. Div. 201, 137 Supp. 1066.

<sup>4</sup> *Harding v. Field*, 84 Hun 540, 32 Supp. 1143.

## CHAPTER II

## Appeals from Municipal Courts and the City Court of the City of New York

SEC.

1. Appeal lies to Appellate Term of Supreme Court.
2. Judgments and orders appealable as of right.
3. Appeals by permission from orders relating to pleadings.
4. Review of intermediate orders may be had on appeal from final judgment.
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SEC.

8. Settlement of case, fees, and time.
9. Time to file return.
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12. Bringing appeal on for argument.
13. Filing briefs. Typewritten briefs permitted.
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15. Procedure on appeals from City Court—time.

### § 1. Appeal lies to Appellate Term of Supreme Court.

Appeals from the Municipal Court of the city of New York for the Boroughs of Manhattan and Bronx run to the Appellate Term of the Supreme Court for the First Department; those from the Municipal Court for the Boroughs of Brooklyn, Queens and Richmond run to the Appellate Term of the Supreme Court, for the Second Department. Appeals from the City Court lie to the Appellate Term of the First Department.

### § 2. Judgments and orders appealable as of right.

In the Municipal Courts an appeal lies from a judgment in an action, a final order in a special proceeding, and an order granting or denying a new trial.<sup>1</sup>

An appeal also lies as of right from the following classes of intermediate orders: orders granting or denying a motion to open a default and vacate a judgment; orders granting or denying a motion to vacate a judgment or a final order for non-service of

<sup>1</sup> Municipal Court Code, § 154, subd. 1, 2, and 3.

process; orders granting or denying a motion to discharge a defendant from arrest, or to vacate or modify a warrant of attachment or a requisition to replevy or a warrant of seizure; orders that the court did not have the power to make.<sup>1</sup>

### § 3. Appeals by permission from orders relating to pleadings.

An appeal may be taken if leave be granted either by the justice who made the order or by a justice of the appellate court, from orders sustaining or overruling an objection taken to a pleading.<sup>2</sup>

### § 4. Review of intermediate orders may be had on appeal from final judgment.

No direct appeal lies from any intermediate order other than those specified above.<sup>3</sup> But any intermediate order necessarily affecting the final disposition of the case may be reviewed on an appeal from a judgment or final order, if it is specified in the notice of appeal and if it has not already been reviewed upon a separate appeal.<sup>4</sup>

### § 5. Time to appeal, twenty days.

An appeal must be taken within twenty days after the entry of the judgment or order or final order.<sup>5</sup>

### § 6. Method of taking appeal.

An appeal is taken by filing a notice of appeal subscribed by the appellant or his attorney, with the clerk of the court in the district where the judgment or order appealed from was entered.<sup>6</sup> The clerk thereupon notifies the attorney for the respondent or the respondent if he appears in person, by mailing a postal card.<sup>7</sup> As the rules of the Municipal Court also provide that where both

<sup>1</sup> Municipal Court Code, § 154, subd. 4, 5, 6, and 8.

<sup>2</sup> Municipal Court Code, § 154, subd. 7.

<sup>3</sup> *Eugester v. Rubenstein*, 92 Misc. 407, 156 Supp. 222; *Oppenheim v. Levine*, 93 Misc. 47, 156 Supp. 599; *Vacaro v. Rini*, 159 N. Y. Supp. 786; *Harris v. Sandow Realty Co.*, 159 N. Y. Supp. 892.

<sup>4</sup> Municipal Court Code, § 155.

<sup>5</sup> Municipal Court Code, § 156.

<sup>6</sup> Municipal Court Code, § 157.

<sup>7</sup> Rule XXV. of the Rules of the Municipal Court.

parties appear by attorney, copies of papers with notice of filing must be served upon the attorney for the adverse party within one day after filing,<sup>1</sup> it is advisable to serve a copy of the notice of appeal upon the attorney for the respondent, although it is doubtful whether failure to do so would be deemed a jurisdictional defect.

### § 7. How execution may be stayed.

Execution may be stayed pending appeal either by filing with the clerk an undertaking, which must be for at least \$100 and not less than twice the amount of the judgment; or by depositing with the clerk a sum of money equal to the amount of the judgment with interest for one year, and \$50 in addition.<sup>2</sup>

### § 8. Settlement of case, fees, and time.

Within five days after filing the notice of appeal, the appellant must deposit with the clerk the fees of the stenographer for a transcript of his minutes.<sup>3</sup> Within ten days thereafter the stenographer must file with the clerk a transcript of his minutes.<sup>4</sup> The clerk immediately notifies the appellant of that fact. Within two days after the receipt of such notice, the appellant must give to the clerk and the respondent at least three days' notice of settlement of the case, returnable before the justice who tried the action.<sup>5</sup>

The case on appeal must be settled by the trial justice within five days after it is submitted.

### § 9. Time to file return.

Within two days after the settlement of the case the clerk must file the return with the clerk of the Appellate Term.<sup>6</sup>

<sup>1</sup> Rule XXIII.

<sup>2</sup> Municipal Court Code, § 159.

<sup>3</sup> Rules XXVI. (b) of the Rules of the Municipal Court.

<sup>4</sup> Municipal Court Code, § 161, subd. 1; Rule XXVI. (b).

<sup>5</sup> Municipal Court Code, § 161, subd. 1; Rules of the Appellate Term, First Department, Rule III.

<sup>6</sup> Municipal Court Code, § 161, subd. 1; Rules of the Appellate Term, First Department, Rule III.

Where no testimony was taken or a settlement of a case is not required, the clerk must file his return within fifteen days after the filing of the notice of appeal.<sup>1</sup>

### § 10. Contents of return.

The return contains, in addition to the stenographer's minutes, a statement of proceedings had, copies of the notice of appeal, the summons, the pleadings, the bill of particulars, if any, any intermediate order brought up for review and the papers on which it was based, the judgment or order appealed from, the exhibits, the opinion of the court or a statement that none was rendered, the settlement of the case by the trial justice, and the clerk's certificate. Copies of these papers must be furnished to the clerk by the appellant at the time he files the notice of the settlement of the case.<sup>2</sup>

### § 11. Motion to dismiss for failure to prosecute.

A motion may be made in the Appellate Term to dismiss the appeal for failure of the appellant to secure compliance with any of the foregoing requirements. The motion may be made on three days' notice in the First Department and five days' notice in the Second Department.<sup>3</sup>

### § 12. Bringing appeal on for argument.

The clerk of the Appellate Term places on the calendar all appeals in which the return has been filed at least ten days prior to the commencement of the term. An appeal is brought on for hearing by the service of an eight days' notice of argument upon the other side. The notice must be filed with the clerk on or before the Monday preceding the first day of the term.<sup>4</sup>

<sup>1</sup> Rule III. of the Rules of the Appellate Term, First Department.

<sup>2</sup> Municipal Court Code, § 161, subd. 1; Rule IV of the Rules of the Appellate Term, First Department; Rule XV of the Rules of the Municipal Court Rules.

<sup>3</sup> Rule III. of the Rules of the Appellate Term, First Department; Rules II. and VII. of the Rules of the Appellate Term, Second Department.

<sup>4</sup> Rules II. and V. of the Appellate Term, First Department; Rules I. and IV. of the Appellate Term, Second Department.

**§ 13. Filing briefs. Typewritten briefs permitted.**

The appellant must serve one copy of his brief on the respondent and file three copies with the clerk on or before the Monday preceding the first day of the term for which the appeal is noticed for argument. The respondent must serve and file his brief not later than noon of the following Saturday in the First Department, and not later than noon of the following Friday in the Second Department. The briefs may be either printed or typewritten.<sup>1</sup>

**§ 14. When further appeal to Appellate Division permitted.**

No appeal lies as of right from a determination of the Appellate Term, but an appeal may be taken to the Appellate Division by permission of either the Justices of the Appellate Term, or a justice of the Appellate Division for the same department.<sup>2</sup>

**§ 15. Procedure on appeals from City Court—time.**

The method of procedure on appeals from the City Court is the same as in the case of appeals from the Supreme Court to the Appellate Division (Chapter IV.); except that the appeal must be taken within ten days after the service of a copy of the judgment or order appealed from, with notice of entry.<sup>3</sup>

<sup>1</sup> Rule V. of the Appellate Term, First Department, and Calendar Rule III.; Rule V. of the Appellate Term, Second Department.

<sup>2</sup> Code, § 1344, subd. 2; Rule VII. of the Appellate Term, First Department; Rule VIII. of the Appellate Term, Second Department; Rule X. of the Appellate Division, First Department; Special Rule of the Appellate Division, Second Department.

<sup>3</sup> Code of Civil Procedure, § 3190.

## CHAPTER III

## Appeals from Justices' Courts

Sec.

1. Appeal taken to County Courts.

Trial *de novo*.

2. Time of taking appeal.

3. Appeal—how taken.

4. Stay of execution.

Sec.

5. Time for Justice's return.

6. Procedure on new trial in Appellate Court.

7. Procedure on appeal.

**§ 1. Appeal taken to County Courts. Trial de novo.**

Appeals from Justices' Courts lie to the County Courts.<sup>1</sup> The appellate procedure in cases tried before a Justice of the Peace is somewhat anomalous in that in certain instances<sup>2</sup> the appellant has a right to a trial *de novo* in the appellate tribunal.

**§ 2. Time for taking appeal.**

An appeal must be taken within twenty days after the entry of judgment, except in case of judgments by default obtained without personal service of the summons, in which event the appeal may be taken within twenty days after personal service on the defendant of a notice of the entry of the judgment, but in no event after the expiration of five years from the entry of the judgment.<sup>3</sup>

**§ 3. Appeal—how taken.**

The appeal is taken by the service of a notice of appeal on the respondent or his attorney, and on the trial justice.<sup>4</sup>

**§ 4. Stay of execution.**

The appellant may obtain a stay of execution by delivering an undertaking to the trial justice in the sum twice the amount of the judgment and at least \$100, and serving a copy with notice of delivery on the respondent.<sup>5</sup>

<sup>1</sup> Code Civ. Pro., § 3045.<sup>2</sup> Code Civ. Pro., § 3068.<sup>3</sup> *Id.*, § 3046.<sup>4</sup> *Id.*, §§ 3047-8.<sup>5</sup> *Id.*, § 3050.

**§ 5. Time for Justice's return.**

The trial justice must file his return with the clerk of the appellate court after the expiration of ten and within thirty days from the service of the notice of appeal. The return need not include a transcript of the evidence if the notice of appeal demands a new trial in the appellate court.<sup>1</sup>

**§ 6. Procedure on new trial in Appellate Court.**

In all actions involving more than fifty dollars, the appellant may in his notice of appeal demand a new trial in the appellate court, provided he at the same time files the undertaking required to stay execution.<sup>2</sup> After the expiration of ten days from the time of the filing of the justice's return, the action is deemed an action at issue in the appellate court, and all the proceedings therein are the same as if the action had been commenced in the appellate court.<sup>3</sup>

**§ 7. Procedure on appeal.**

An appeal can be brought on for argument, after the return is filed, on eight days' notice of argument.<sup>4</sup> The appeal is heard on the original return or a certified copy thereof. The appellate court may affirm, modify, or reverse the judgment in whole or in part, and where the judgment is reversed as contrary to or against the weight of evidence, a new trial may be ordered either before the same justice or another justice of the same county to be designated in the order.<sup>5</sup>

If the appeal is taken by a defendant who failed to appear before the justice, and he shows, by affidavit or otherwise, that manifest injustice has been done and gives a satisfactory excuse for his default, the appellate court may set aside the judgment and order a new trial.<sup>6</sup>

<sup>1</sup> Code Civ. Pro., § 3053.

<sup>3</sup> *Id.*, § 3071.

<sup>5</sup> *Id.*, § 3063.

<sup>2</sup> Code Civ. Pro., §§ 3068-9.

<sup>4</sup> *Id.*, § 3062.

<sup>6</sup> *Id.*, § 3064.



## CHAPTER IV

### Appeals from Trial and Special Terms of the Supreme Court and the County Courts to Appellate Division

SEC.

1. Appeal lies to Appellate Division of Supreme Court. Departments.
2. Judgments and orders appealable from the Supreme Court.
3. When no appeal lies.
4. Manner of taking appeal.
5. Time to appeal.
6. How proceedings may be stayed pending appeal from judgments and final orders.
7. Nature of undertaking in such cases.
8. When stay discretionary.
9. Stay pending appeal from intermediate orders discretionary.
10. When stay obtained without security.
11. Application to limit or dispense with security, where made.
  - (a) In an action.
  - (b) In a special proceeding.
  - (c) In jury cases.
12. Review of interlocutory judgments and orders on appeal from final judgment. Provisos.
13. Appeal from a judgment brings up facts and law.
14. Exceptions to conclusions of law. No exceptions to findings of facts—when necessary.
15. Exceptions to conclusions of law—when and how taken.
16. Filing record on appeal from intermediate orders. Time.
17. Contents of record.

SEC.

18. Voluminous exhibits—dispensed with—methods of procedure.
19. Certifying the record.
20. Record on appeal from judgment or final order.
  - (a) Appeal on judgment roll only.
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21. Appeal on judgment roll, contents of record.
22. Time to file record.
23. Appeal on bill of exceptions. Settling the bill.
24. Time to file printed record and bill of exceptions.
25. Contents of record.
26. Record must be ordered filed.
27. Appeal on a "case." Contents and preparation of "case."
28. Service of proposed case and amendments. Time.
29. Settlement of case on notice. Time.
30. Marking amendments and stenographer's minutes.
31. Certificate that case contains all evidence vital.
32. Effect of defaults.
33. Extensions of time, how obtained.
34. Filing the record, its contents.
35. Mandamus to compel settlement of case or exceptions.
36. When motion for new trial in jury case may be sent by trial judge for hearing in Appellate Division in first instance.

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| <p>Sec.<br/>37. Effect of the order. Limitations.<br/>38. Motion for new trial in equity—how and when made in Appellate Division.<br/>39. Record on motion for new trial.<br/>40. Motion for judgment on a verdict taken subject to opinion of the court.<br/>41. Serving and filing briefs.<br/>42. Method of bringing appeal on for argument.<br/>43. Motion to dismiss appeal for failure</p> | <p>Sec.<br/>to prosecute, made at Appellate Division.<br/>44. Disposition of appeal, power of Appellate Division.<br/>45. Granting final judgment on reversal in actions at law. Prerequisites, trial motions.<br/>46. When new findings necessary on reversal in equity.<br/>47. Provisions applicable to appeals from County Courts.</p> |
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### § 1. Appeal lies to Appellate Division of Supreme Court Departments.

Appeals from Trial and Special Terms of the Supreme Court lie to the Appellate Division of the Supreme Court. For this purpose the State is divided into four departments, and one Appellate Division sits in each department.

### § 2. Judgments and orders appealable from the Supreme Court.

Appeals lie from all interlocutory and final judgments of the Supreme Court,<sup>1</sup> and from all orders of that Court made on notice, affecting substantial rights.<sup>2</sup>

### § 3. When no appeal lies.

But no appeal lies from an order granted *ex parte*, the proper remedy being to move to vacate it and then to appeal from the order denying the motion.<sup>3</sup>

An order denying a motion for a reargument is not appealable.<sup>4</sup>

Where the order sought to be reviewed has been resettled, the appeal must be from the resettled order, and an appeal from the original order will be dismissed.<sup>5</sup>

<sup>1</sup> Code Civ. Pro., §§ 1346, 1349.

<sup>2</sup> Code Civ. Pro., §§ 1347, 1348.

<sup>3</sup> Stewart v. Stewart, 127 App. Div. 672, 111 Supp. 734; Matter of Reddish, 47 App. Div. 187, 62 Supp. 261.

<sup>4</sup> Harding v. Conlon, 146 App. Div. 842, 131 Supp. 903; Peterson v. Felt, 61 App. Div. 176, 70 Supp. 440; Tucker v. Dudley, 104 App. Div. 191, 93 Supp. 355.

<sup>5</sup> Dewsnap v. Matthews, 119 App. Div. 167, 104 Supp. 330.

**§ 4. Manner of taking appeal.**

The appeal is taken by serving a notice of appeal on the respondent and on the clerk of the county in which the venue of the action is laid.

**§ 5. Time to appeal.**

It must be taken within thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from, and a written notice of entry thereof.<sup>1</sup>

**§ 6. How proceedings may be stayed as of right pending appeal from judgments and final orders.**

In certain cases a stay may be obtained as of course by filing an undertaking in the clerk's office and serving a copy with notice of filing on the respondent.<sup>2</sup>

**§ 7. Nature of undertaking in such cases.**

(a) If the judgment or order is for the payment of a sum of money, the undertaking must cover the amount of the judgment and five hundred dollars costs on appeal.<sup>3</sup>

(b) If it is for the recovery of a chattel, the undertaking must be in a sum fixed by the trial court or a judge thereof.<sup>4</sup>

(c) If the judgment or order directs the assignment or delivery of a document or of personal property, a stay may be obtained by bringing the document or thing into the court below or placing it in the custody of an officer or receiver, and giving an undertaking for five hundred dollars costs on appeal, or by giving an undertaking in a sum fixed by the trial court or a judge thereof.<sup>5</sup>

(d) If it directs the execution of a conveyance or other instrument, in order to secure a stay, it is necessary to execute and deposit the instrument with the clerk, as well as to give an undertaking for the costs of the appeal.<sup>6</sup>

(e) If the judgment or order directs the delivery of the possession of real property, an undertaking must be given not to

<sup>1</sup> Code Civ. Pro., § 1351.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, § 1329.

<sup>4</sup> Code Civ. Pro., § 1352, 1326, 1327.

<sup>5</sup> *Id.*, § 1329.

<sup>6</sup> *Id.*, § 1330.

commit waste. If the property is in possession of the appellant, the undertaking must also provide that, in case of a deficiency upon a sale, he will pay the value of the use and occupation of such property pending the appeal.

(f) In foreclosure actions, if the judgment awards the payment of any deficiency against the appellant, the undertaking must also provide for the payment of any deficiency.<sup>1</sup>

### § 8. When stay discretionary.

In case of judgments or orders other than specified above, a stay is discretionary and may be granted by an order either of the trial court, or of the appellate court.<sup>2</sup>

In equity cases, the court may in the exercise of its discretion suspend the operation of a final judgment pending appeal.<sup>3</sup>

### § 9. Stay pending appeal from intermediate orders discretionary.

On appeals from an intermediate order the granting of a stay is within the discretion of the court making the order or of the appellate court. By an amendment to Section 606 of the Code adopted in 1913, the Appellate Division may continue an injunction pending an appeal from an order or judgment dissolving or vacating it.<sup>4</sup>

### § 10. When stay obtained without security.

Where the appellant is an executor, administrator, trustee, or other person acting in another's right, the security necessary to obtain a stay may be dispensed with or limited in the discretion of the court.<sup>5</sup>

The aggregate sum in which one or more undertakings are required to be given may be limited to not less than \$50,000, where it would otherwise exceed that sum.<sup>6</sup>

<sup>1</sup> Code Civ. Pro., § 1331.

<sup>2</sup> *Sagenhomme v. Pugh & Co.*, 53 Misc. 41, 102 Supp. 923; *People ex rel. Keeseville, etc. Co. v. Powers*, 73 Misc. 269, 130 Supp. 865.

<sup>3</sup> *Genet v. D. & H. Canal Co.*, 113 N. Y. 472, 21 N. E. 390.

<sup>4</sup> *U. S. Title Guaranty Co. v. Brown*, 158 App. Div. 542, 143 Supp. 835.

<sup>5</sup> Code Civ. Pro., § 1312, subd. 1.

<sup>6</sup> *Id.*, § 1312, subd. 2.

**§ 11. Application to limit or dispense with security, where made.**

(a) The application to limit or dispense with security may be made either to the lower court or to the Court to which an appeal is taken, if the appeal is to the Appellate Division from a judgment or order in an action in the Supreme Court or if the appeal is to the Court of Appeals from a determination of the Appellate Division.

(b) But if the appeal is taken to the Appellate Division from an order in a special proceeding, or from an inferior court, the application must be made to the Appellate Division.<sup>2</sup>

(c) In jury cases, if a motion for a new trial upon exceptions is directed to be heard in the first instance in the Appellate Division the judgment is *ipso facto*, suspended, thus in effect providing a stay without security.<sup>2</sup>

**§ 12. Review of interlocutory judgments and orders on appeal from final judgment. Provisos.**

An appeal from a final judgment or order brings up for review an interlocutory judgment or an intermediate order which is specified in the notice of appeal and which necessarily affects the final judgment or order, provided it has not already been reviewed upon a separate appeal therefrom by the court or term of court to which the appeal from the final judgment or order is taken.<sup>3</sup> On an appeal from an intermediate order, however, previous intermediate orders cannot be reviewed.<sup>4</sup>

**§ 13. Appeal from a judgment brings up facts and law.**

An appeal from a judgment rendered after a trial without a jury brings up for review both questions of law and fact.<sup>5</sup> On the other hand, prior to September 1, 1914, an appeal from a judgment rendered upon the verdict of a jury brought up for review only

<sup>1</sup> Code Civ. Pro., § 1312.

<sup>2</sup> See § 36, *infra*.

<sup>3</sup> Code Civ. Pro., §§ 1301, 1316; N. Y. Lackawanna, etc., R. Co. v. Erie R. Co., 170 N. Y. 448, 63 N. E. 448.

<sup>4</sup> Arkenburgh v. Arkenburgh, 14 App. Div. 367, 43 Supp. 892; Eckert v. Truman, 163 App. Div. 17, 148 Supp. 48.

<sup>5</sup> Code Civ. Pro., § 1346, subd. 1.

questions of law, and in order to secure a review of the facts it was necessary to appeal from the order denying the motion to set aside the verdict and for a new trial.<sup>1</sup> An amendment to subdivision 2 of Section 1346, which went in effect on that day, changed the practice in that regard, so that now questions of fact as well as questions of law can be reviewed by the Appellate Division on an appeal from a judgment rendered after a trial by jury.<sup>2</sup>

**§ 14. Exceptions to conclusions of law. No exceptions to findings of facts—when necessary.**

On an appeal from a judgment rendered after a trial without a jury, in order to secure a review of questions of law involved in the decision, it is necessary to serve and file exceptions to the conclusions of law,<sup>3</sup> as otherwise they cannot be passed upon by the appellate tribunal.<sup>4</sup> But no exceptions are necessary in order to obtain a review of the facts.<sup>5</sup> Therefore, exceptions to findings of fact are superfluous, in so far as the Appellate Division is concerned. But exceptions to the findings of fact are necessary, in order to secure a review by the Court of Appeals of the question as to whether there was any evidence tending to sustain a finding of fact, since that is a question of law and not of fact.<sup>6</sup>

Exceptions may be taken to refusals to find as well as to findings.<sup>7</sup>

**§ 15. Exceptions to conclusions of law—when and how taken.**

The exceptions must be filed in the clerk's office and a copy

<sup>1</sup> Gillan v. O'Leary, 124 App. Div. 498, 108 Supp. 1024; Pease v. Pennsylvania R. R. Co., 137 App. Div. 458, 122 Supp. 784.

<sup>2</sup> See Smith v. Smith, 216 N. Y. 495, 499, 111 N. E. 77.

<sup>3</sup> Code Civ. Pro., §§ 992, 993, 994.

<sup>4</sup> Frederick v. City of Johnstown, 47 App. Div. 221, 62 Supp. 66; Dunleavy v. Dunleavy, 87 App. Div. 601, 84 Supp. 562.

<sup>5</sup> Witte v. Koerner, 123 App. Div. 824, 108 Supp. 560; Hill v. White, 46 App. Div. 360, 61 Supp. 515, affd. 170 N. Y. 566; Bissell v. Myton, 160 App. Div. 268, 145 Supp. 591.

<sup>6</sup> Carroll v. Bullock, 207 N. Y. 567, 101 N. E. 438; Bissell v. Myton, 160 App. Div. 268, 145 Supp. 591.

<sup>7</sup> Code Civ. Pro., § 1023.

with notice of filing served on the attorney for the adverse party. This must be done before the expiration of ten days after the service upon the attorney for the exceptant of a copy of the decision of the court or report of the referee, and of a notice of entry of judgment thereupon.<sup>1</sup>

A separate exception should be taken to each conclusion of law and finding of fact sought to be reviewed, as a general exception to the decision will not suffice.<sup>2</sup>

#### § 16. Filing record on appeal from intermediate orders. Time.

The printed record on an appeal from an intermediate order must be filed in the office of the clerk of the Appellate Division within fifteen days after the appeal is taken, and at the same time three copies must be served on the respondent.

#### § 17. Contents of record.

The record consists of the notice of appeal, order appealed from, and all the papers which were before the court that heard the motion, as well the opinion of the court, or in lieu thereof an affidavit that no opinion was rendered.<sup>3</sup>

#### § 18. Voluminous exhibits dispensed with. Method of procedure.

If among the papers there are exhibits or voluminous documents that are not necessary for a consideration of the appeal or that are material only as to the fact of their existence or as to a small part of their contents, the judge from whose order the appeal is taken may order that such exhibits or documents need not be inserted in the printed papers. Or, the parties may by stipulation, or the judge may upon notice, settle a statement respecting the same, to be printed in the record in lieu of the original exhibit or document.<sup>4</sup>

<sup>1</sup> Code Civ. Pro., § 994.

<sup>2</sup> *Gilmour v. Colcord*, 183 N. Y. 342, 76 N. E. 273; *Colby v. Town of Day*, 177 N. Y. 548, 69 N. E. 367; *Ostrander v. State of New York*, 192 N. Y. 421, 85 N. E. 668.

<sup>3</sup> Rule 41 of the General Rules of Practice.

<sup>4</sup> Rules 34 and 41 of the General Rules of Practice.

**§ 19. Certifying the record.**

The printed papers must either be certified by the clerk of the court from which the appeal is taken, or stipulated by the parties to be true copies of the original and of the whole thereof.<sup>1</sup> The latter is the usual practice.

**§ 20. Record on appeal from judgments or final order.**

An appeal from a judgment or from a final order in a special proceeding may be brought up to the Appellate Division in any one of three ways:

(a) On the judgment roll alone, where the appellant does not desire a review of the facts, but merely wishes a consideration of questions arising on the judgment roll, as for example, when it is desired to secure a review of conclusions of law after a trial without a jury, or of a ruling on a demurrer.

(b) On a bill of exceptions, where the appellant does not desire a review of the facts, but seeks a consideration of questions of law arising in the course of trial, such as rulings on points of evidence, etc.

(c) On a case and exceptions, where the appellant desires a review of the facts.

**§ 21. Appeal on judgment roll. Contents of record.**

When the appellant does not wish to make a bill of exceptions, or a case and exceptions,<sup>2</sup> the record on appeal consists of the notice of appeal, the judgment roll, and the opinion of the trial court or in lieu thereof an affidavit that no opinion was rendered. These papers must be preceded by a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings; the names of the original parties in full; and any change in the parties if such has taken place. The papers must either be certified by the clerk or stipulated by

<sup>1</sup> Code Civ. Pro., §§ 1353, 3301; Rule 41 of the General Rules of Practice; see Rule 34 for full directions as to manner of printing.

<sup>2</sup> See § 20 *supra*.



the parties to be correct copies of the original.<sup>1</sup> The latter is the usual practice.

### § 22. Time to file record.

The printed record must be filed in the office of the clerk of the Appellate Division and three copies thereof served on the respondent within twenty days after the appeal is taken.<sup>2</sup>

### § 23. Appeal on bill of exceptions. Settling the bill.

When the appellant desires to bring up his appeal upon a bill of exceptions, the first step for him to take is to settle the bill of exceptions. The bill of exceptions must contain only so much of the evidence as is necessary to present the questions of law upon which exceptions were taken on the trial and a review of which is sought in the Appellate Division.<sup>3</sup> The method of settling the bill of exception is the same as that of settling a case.<sup>4</sup>

### § 24. Time to file printed record and bill of exceptions.

Within twenty days after the bill of exceptions is settled, the appellant must file in the office of the clerk of the Appellate Division a printed copy of the record and serve three copies on his opponent.

### § 25. Contents of record.

The record must consist of the bill of exceptions as settled, and in addition thereto of all the papers required in a record on an appeal on a judgment roll.<sup>5</sup>

### § 26. Record must be ordered filed.

There must be appended an order signed by the trial justice directing the filing of the record.

### § 27. Appeal on a "case." Contents and preparation of "case."

When the appeal is to be brought up on a case, the first step for the appellant to undertake is the settlement of a case. The

<sup>1</sup> Rule 41 of the General Rules of Practice; see also Rule 34 for full directions as to manner of printing.

<sup>2</sup> Rule 41.

<sup>3</sup> Rule 34 of the General Rules of Practice.

<sup>4</sup> See § 27 *infra*.

<sup>5</sup> See § 21 *supra*; Rule 41 of the General Rules of Practice.

case must contain all the evidence given at the trial, by question and answer, the rulings of the court, and the exceptions of all parties to the record.<sup>1</sup> Formerly, only the appellant's exceptions were inserted in the record, but now, in view of the amendment of 1913 to Section 1317 of the Code of Civil Procedure, which permits the Appellate Division to render final judgment on a reversal, it is required that the exceptions of all the parties be included.<sup>2</sup>

The opening, summing up, and the remarks of counsel are not to be included in the case, unless the trial justice otherwise orders.

Each line of the case must be numbered.<sup>3</sup>

### § 28. Service of proposed case and amendments. Time.

The appellant must prepare the case and serve a copy of it on the respondent within thirty days after service of a notice of entry of the judgment or service of a copy of an order deciding a motion for a new trial. Within ten days thereafter the respondent may propose amendments to the case by serving a copy of them on the appellant.<sup>4</sup>

### § 29. Settlement of case on notice. Time.

Within four days thereafter the appellant may notice the case for settlement before the trial justice. The time for which the settlement is noticed must be not less than four and not more than ten days after the service of the notice.<sup>5</sup> The case and amendments must be submitted to the trial justice for settlement at the time specified. The stenographer's minutes must also be submitted to the judge.

### § 30. Marking amendments and stenographer's minutes.

The appellant must mark on each amendment his allowance or disallowance thereof, marking thereon and on the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment.<sup>6</sup> The trial

<sup>1</sup> Rule 34 of the General Rules of Practice.

<sup>2</sup> *Bonnette v. Molloy*, 153 App. Div. 731, 138 Supp. 67.

<sup>3</sup> Rule 32 of the General Rules of Practice.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Rule 32 of the General Rules of Practice.

justice then passes on the contested amendments and settles the case accordingly.

### § 31. Certificate that case contains all evidence vital.

There must be appended to the case a certificate that it contains all the evidence given at the trial. This is vital, as otherwise the Appellate Division cannot review the facts.<sup>1</sup>

### § 32. Effect of defaults.

If the appellant fails to serve a case within the required time, he is deemed to have waived his right thereto. If the respondent fails to serve amendments in time, he is deemed to have agreed to the case as proposed. If the appellant does not notice the case for settlement within the prescribed period after the service of the amendments, he is deemed to have agreed to them.<sup>2</sup>

### § 33. Extensions of time, how obtained.

Applications to extend time to serve a case or propose amendments must be made at Special Term, and not in the Appellate Division.<sup>3</sup> Such motions may be made on two days' notice.<sup>4</sup>

### § 34. Filing the record, its contents.

Within twenty days after the case is settled the appellant must file in the office of the clerk of the Appellate Division a printed copy of the record and serve three copies on the respondent. The record must consist of the case as settled and in addition thereto of all the papers required to be included in a record on an appeal on a judgment roll,<sup>5</sup> and there must be appended to it an order signed by the trial justice directing the filing of the record.

<sup>1</sup> Gregory v. Clark, 53 App. Div. 74, 65 Supp. 687; Iaquinto v. Bauer, 104 App. Div. 56, 93 Supp. 388; Whyte v. Denike, 53 App. Div. 320, 65 Supp. 577; German v. Brooklyn Heights R. R. Co., 107 App. Div. 354, 95 Supp. 112; Ceballos v. Munson, 112 App. Div. 352, 98 Supp. 464.

<sup>2</sup> Rule 33 of the General Rules of Practice.

<sup>3</sup> McKeon v. Sherman, 168 App. Div. 887, 152 Supp. 435.

<sup>4</sup> Rule 32 of the General Rules of Practice.

<sup>5</sup> See § 21 supra; Rule 41 of the General Rules of Practice.

**§ 35. Mandamus to compel settlement of case or exceptions.**

A writ of mandamus lies to compel the trial justice to settle a case or a bill of exceptions.<sup>1</sup>

**§ 36. When motion for a new trial in jury case may be sent by trial judge for hearing in Appellate Division in first instance.**

Upon the application of a party who has taken one or more exceptions, at a jury trial, the presiding justice may in his discretion, at any time during the term at which the case was tried, make an order directing that the exceptions so taken be heard in the first instance by the Appellate Division, and that judgment be suspended in the meantime. The entry of the order is equivalent to the making of a motion for a new trial. The motion is heard by the Appellate Division upon the exceptions, and either party may notice it for hearing.<sup>2</sup>

**§ 37. Effect of the order. Limitations.**

The advantage of this procedure is that it in effect gives the defeated litigant a stay pending appeal without security.

An order directing a motion for a new trial upon exceptions to be heard in the first instance by the Appellate Divisions cannot be made after a motion for a new trial on the minutes under § 999 of the Code was made and denied.<sup>3</sup>

**§ 38. Motion for new trial in equity—how and when made in Appellate Division.**

The proceeding described in the preceding paragraph is limited to jury trials, and the trial justice cannot direct exceptions to be heard in the first instance by the Appellate Division where the case was tried without a jury.<sup>4</sup> On the other hand, in such a case the defeated party may make a motion for a new trial upon exceptions, before the Appellate Division, if the trial resulted in an interlocutory judgment, requiring further proceedings before

<sup>1</sup> People ex rel. Adams v. Baker, 14 Abb. Pr., 19.

<sup>2</sup> Code Civ. Pro., § 1000.

<sup>3</sup> Babad v. Colton Dental Assn., 150 App. Div. 561, 135 Supp. 555.

<sup>4</sup> McNaughton v. Osgood, 114 N. Y. 574, 21 N. E. 1044.

final judgment can be entered. Such a motion must be made at a term of the Appellate Division after the entry of the interlocutory judgment and before the commencement of the hearing directed thereby.<sup>1</sup>

Only questions of law may be reviewed on such a motion.<sup>2</sup>

### § 39. Record on motion for new trial.

The rules that are applicable to the preparation of cases and appeal books on appeal to the Appellate Division also govern the preparation of the record on a motion for a new trial heard in the Appellate Division.<sup>3</sup>

### § 40. Motion for judgment on a verdict taken subject to opinion of the court.

When a verdict is taken subject to the opinion of the court,<sup>4</sup> a motion for a verdict thereon may be made by either party and must be heard and decided by the Appellate Division.<sup>5</sup>

### § 41. Serving and filing briefs.

After the record is filed in the office of the clerk of the Appellate Division, it becomes the duty of the appellant to serve and file his brief. The respondent may then serve and file an answering brief, to which the appellant may file a reply brief. The time within which the briefs are to be served vary in the different departments, and the rules of the Appellate Division for each department should be consulted for that purpose.

### § 42. Method of bringing appeal on for argument.

The exact method of noticing an appeal for argument and placing it on the calendar varies in the different departments, and the rules of the Appellate Division for each department should be consulted for that purpose.

Special days are set aside for the hearing of appeals from orders.

<sup>1</sup> Code Civ. Pro., § 1001.

<sup>2</sup> Raynor v. Raynor, 94 N. Y. 248; Dorchester v. Dorchester, 121 N. Y. 156, 23 N. E. 1043; Fox v. Fox, 128 App. Div. 876, 113 Supp. 121.

<sup>3</sup> See §§ 21 and 23 *supra*.

<sup>4</sup> See Code Civ. Pro., § 1185.

<sup>5</sup> Code Civ. Pro., § 1234; South Bay Co. v. Howey, 190 N. Y. 240, 83 N. E. 26.

**§ 43. Motion to dismiss appeal for failure to prosecute made at Appellate Division.**

The respondent may move to dismiss the appeal for failure of the appellant to take any of the foregoing steps within the allotted time. Such a motion must be made in the Appellate Division, and not at Special Term.<sup>1</sup>

**§ 44. Disposition of appeal, power of Appellate Division.**

The Appellate Division may affirm, reverse, or modify the judgment or order appealed from. In cases of reversal, the power of the Appellate Division was broadened by an amendment to § 1317 that went into effect on September 1, 1912, so that it is no longer limited to granting a new trial. The Appellate Division may reverse a judgment and grant final judgment such as should have been rendered by the trial court.<sup>2</sup>

**§ 45. Granting final judgment on reversal in actions at law. Prerequisites, trial motions.**

In actions at law such final judgment must be based on a motion to dismiss the complaint or on a motion for a directed verdict, and unless there is proper basis in the record for a final judgment in favor of the respondent, the Appellate Division, upon reversal, is limited to granting a new trial.<sup>3</sup> This makes it especially important that all the requisite motions be made at the trial.

**§ 46. When new findings necessary on reversal in equity.**

In equity actions, if the Appellate Division reverses the judgment of the trial court and grants final judgment, it must specify in its order of reversal what findings are set aside, and must make new findings, as the judgment that it renders must be sustained by the findings.<sup>4</sup>

<sup>1</sup> *Spindler v. Gibson*, 72 App. Div. 150, 76 Supp. 410.

<sup>2</sup> *Bonnette v. Molloy*, 209 N. Y. 167, 102 N. E. 559; *Saltzburg v. Utico Home Teleph. Co.*, 159 App. Div. 51, 144 Supp. 309; *Tanzer v. Bankers' L. & M. Co.*, 159 App. Div., 351, 144 Supp. 613; *Peterson v. Ocean El. R. Co.*, 161 App. Div. 720, 146 Supp. 604.

<sup>3</sup> *Mendelson v. Irving*, 155 App. Div. 114, 139 Supp. 1065.

<sup>4</sup> *Bonnette v. Molloy*, 209 N. Y. 167, 102 N. E. 559; *Marks v. Kellogg*, 170 App. Div. 464, 156 Supp. 120, 217 N. Y. 660; *Lamport v. Smedley*, 213 N. Y. 82, 106 N. E. 922; *Town of Queensbury v. Hudson Valley Ry. Co.*, 218 N. Y. 648, 112 N. E. 749.

**§ 47. Provisions applicable to appeals from County Courts.**

Appeals from the County Courts lie to the Appellate Division, and the method of procedure is the same as in the case of appeals from the Supreme Court.<sup>1</sup> Appeals, however, can be taken only from final judgments of the County Courts.<sup>2</sup>

<sup>1</sup> Code Civ. Pro., § 1340.

<sup>2</sup> Fox v. Fox, 128 App. Div. 876, 113 Supp. 121.

## CHAPTER V

## Appeals from the Surrogates Courts

SEC.

1. Appeal lies to Appellate Division of Supreme Court. General rules of procedure.
2. Parties.
3. Time to appeal. Where appellant enters decree.

SEC.

4. Undertaking for costs—when necessary.
5. Power of Appellate Division over facts. Further testimony or reference.

**§ 1. Appeal lies to Appellate Division of Supreme Court. General rules of procedure.**

Appeals from orders and decrees of the Surrogates Courts lie to the Appellate Division. The procedure is substantially the same as in the case of appeals from the Supreme Court,<sup>1</sup> with the following exceptions.

**§ 2. Parties.**

Each party who has appeared in the court below must be made a party to the appeal. In addition to that, other parties may be brought in by order of the appellate court, after the appeal is taken.<sup>2</sup>

**§ 3. Time to appeal where appellant enters decree.**

As in the case of appeals from the Supreme Court, the appeal must be taken within thirty days after service of a copy of the decree or order with notice of entry. But where the party entering the decree or order is the appellant, his time to appeal runs from the date of its entry and it is not necessary to serve him with notice of entry in order to limit his time to appeal.<sup>3</sup>

**§ 4. Undertaking for costs—when necessary.**

In certain cases security for costs in the amount of \$250 is necessary to perfect the appeal.<sup>4</sup>

<sup>1</sup> See Chap. IV.

<sup>2</sup> Code Civ. Pro., § 2756.

<sup>3</sup> Code Civ. Pro., § 2755.

<sup>4</sup> *Id.*, §§ 2759, 2760.



**§ 5. Power of Appellate Division over facts. Further testimony or reference.**

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact that the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.\*

\* Code Civ. Pro., § 2763.

## CHAPTER VI

## The Court of Appeals

## Appeals from the Appellate Division of the Supreme Court

- | SEC.  | SEC.   |
|---|--|
| 1. Jurisdiction of the Court of Appeals over questions of law only, except in capital cases.                | 18. No review of discretionary final orders in special proceedings.  |
| 2. Unanimous decisions of Appellate Division.   | 19. How appeal on question of law taken.   |
| 3. Jurisdiction of the Court of Appeals under the new Act of the year 1917, chap. 190. Appeals as of right. | 20. Disbarment proceedings.  |
| 4. Appeals not of right—by permission.  | 21. Review limited to certified questions of law.  |
| 5. What constitutes a final judgment?   | 22. Time to take appeal to Court of Appeals.   |
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| 7. Permission to appeal—when and how granted.   | 24. What should be appealed from.  |
| 8. Review of interlocutory judgments and orders, when specified, on appeal from final judgment.             | 25. Stipulation for judgment absolute.   |
| 9. Direct appeal from final judgment of special or trial term on affirmance of interlocutory judgment.      | 26. Stay pending appeal, how obtained.   |
| 10. Not permitted on reversal.  | 27. Contents of record on appeal.  |
| 11. Questions reviewable on appeal from judgment of affirmance.   | 28. Time for filing and service.   |
| 12. No appeal from judgment of reversal on the facts.   | 29. Appeal dismissed for failure to file or serve record.  |
| 13. Presumption of reversal on law unless specially stated.   | 30. Filing printed copies with clerk before argument.  |
| 14. Review limited on reversal on facts with judgment absolute.   | 31. Contents of record on appeal from judgment on verdict taken subject to opinion of the court.                     |
| 15. Review on reversal and judgment absolute on law only.   | 32. Bringing appeal on for argument. Notice. New calendar.   |
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| 17. Stipulation for judgment absolute on reversal on law and new trial.                                     | 34. Time for serving and filing briefs.  |
|   | 35. Contents of briefs.  |
|   | 36. Disposition of cause—reversal and judgment absolute.   |
|   | 37. Reversal and new trial.  |
|   | 38. Reversal and remission to Appellate Division.  |

### § 1. Jurisdiction of the Court of Appeals over questions of law only, except in capital cases.

Appeals from the Appellate Division of the Supreme Court lie to the Court of Appeals. The jurisdiction of the Court of Appeals is, however, limited by the constitution and statutes, and appeals from the Appellate Division may be taken only in certain specified instances. The Court of Appeals may review only questions of law, and has no power to review the facts, except in capital cases.<sup>1</sup>

### § 2. Unanimous decisions of Appellate Division.

Whether or not there is any evidence supporting or tending to sustain a finding of fact or a verdict of a jury is a question of law.<sup>2</sup> But in cases of a unanimous affirmance by the Appellate Division, this question is not open to review by the Court of Appeals.<sup>3</sup>

### § 3. Jurisdiction of the Court of Appeals under the new Act of the year 1917, chap. 190—Appeals as of right.

“Sec. 190. The jurisdiction of the court of appeals in civil actions. From and after the thirty-first day of May, nineteen hundred and seventeen, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others:

“1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the division of the court, or where the judgment or order is one of reversal or modification.

“2. An appeal may also be taken as of right to said court from an order of the appellate division granting a new trial on exceptions, where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them.”

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<sup>1</sup> Constitution, Art. VI., § 9; Code Civ. Pro., § 191, subd. 3.

<sup>2</sup> Carroll v. Bullock, 207 N. Y. 567, 581, 101 N. E. 438.

<sup>3</sup> Constitution, Art. VI., § 9; Code Civ. Pro., § 191, subd. 4.

#### § 4. Appeals when not of right—By permission.

"3. An appeal may also be taken from a determination of the appellate division of the supreme court in any department, other than from a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

"4. An appeal may also be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

"The provisions of this section shall not apply to an appeal taken to the court of appeals prior to the first day of June, nineteen hundred and seventeen, but an appeal so taken shall be heard and determined under existing provisions of law."

#### § 5. What constitutes a final judgment?

For the purposes of an appeal to the Court of Appeals, any judgment or order finally determining the action or special proceeding adversely to the appellant, is deemed final even though it may be only interlocutory as to other parties to the action.<sup>1</sup>

#### § 6. Awards of Industrial Commission.

An award of the Workmen's Compensation Commission is deemed a judgment in an action to recover damages for personal injuries, and where the Appellate Division unanimously affirms such an award it is not appealable as of right, and an appeal can be taken only by permission as described in the next section.<sup>2</sup>

#### § 7. Permission to appeal—when and how granted.

The certificate of the Appellate Division can be granted only at the same term at which its determination was rendered or at

<sup>1</sup> *Brown v. Feek*, 204 N. Y. 238, 97 N. E. 526.

<sup>2</sup> *Matter of Harnett v. Steen Co.*, 216 N. Y. 101, 110 N. E. 170.

the next term,<sup>1</sup> except in cases covered by subdivision 4 of § 190 of the Code of Civil Procedure. In the class of cases last mentioned, the application for a certificate may be made at the term at which notice of entry of the judgment is served on the defeated litigant or at the next succeeding term.<sup>2</sup> If the application is denied, an application to the Court of Appeals can be made within thirty days after service of a notice of entry of the order denying the motion.<sup>3</sup> The application must be made on motion, which has to be submitted on printed briefs (eighteen copies) and one copy of the record in the court below, on notice to the adverse party, stating the ground on which such leave is asked.<sup>4</sup>

### **§ 8. Review of interlocutory judgments and orders, when specified, on appeal from final judgment.**

An appeal from a final judgment or order brings up for review an interlocutory judgment or intermediate order which is specified in the notice of appeal, and which necessarily affects the final judgment or order, provided it has not already been reviewed upon a separate appeal.<sup>5</sup>

### **§ 9. Direct appeal from final judgment of Special or Trial Term on affirmance of interlocutory judgment.**

Where an interlocutory judgment has been affirmed by the Appellate Division, or where the Appellate Division has refused a new trial, and final judgment is thereafter rendered at Special or Trial Term, an appeal may be taken from the final judgment directly to the Court of Appeals. In that event, however, the Court of Appeals is limited to reviewing only the determination of the Appellate Division.<sup>6</sup> The purpose of this section is to obviate unnecessary circumlocution, where no review of the final judgment is sought but the defeated party desires to

<sup>1</sup> Terwilliger v. Browning, K. & Co., 207 N. Y. 479, 101 N. E. 463.

<sup>2</sup> Galvin v. N. Y. Central, etc., R. R. Co., 216 N. Y. 710, 110 N. E. 614.

<sup>3</sup> § 1310 of the Code Civ. Pro.

<sup>4</sup> Rule 21 of the Court of Appeals.

<sup>5</sup> See Chap. III., § 12 supra.

<sup>6</sup> Code Civ. Pro., § 1336.

secure a consideration only of the previous ruling of the Appellate Division.

### § 10. Not permitted on reversal.

Although there would seem to be no reason why the same shortcut in procedure should not be permitted in cases where the Appellate Division has reversed an interlocutory judgment, in view of the language of the Code, it is held that in such an instance an appeal from the final judgment must be taken first to the Appellate Division and then to the Court of Appeals. This omission is evidently due to an inadvertence on the part of the legislature, but although attention has been frequently called to it, the error has not been remedied.<sup>1</sup>

### § 11. Questions reviewable on appeal from judgment of affirmance.

An appeal from a judgment of affirmance brings up for review all questions of law, except that where the affirmance is unanimous, the Court cannot review the question as to whether there is any evidence supporting or tending to sustain a finding of fact or a verdict of a jury.<sup>2</sup> Where the affirmance is not unanimous, this question may be reviewed.<sup>3</sup> If, however, there are no exceptions in the record and consequently no questions of law to be reviewed, or where the exceptions are frivolous, the appeal will be dismissed, and a motion to that end may be made in the Court of Appeals.<sup>4</sup>

### § 12. No appeal from judgment of reversal on the facts.

Inasmuch as the Court of Appeals may not consider questions of fact, where a judgment is reversed both on the law and the facts or on the facts only, no question is presented for review by

<sup>1</sup>Will v. Barnwell, 197 N. Y. 298, 90 N. E. 817; McNamara v. Golden, 194 N. Y. 315, 87 N. E. 440; Leonard v. Barnum, 168 N. Y. 41, 60 N. E. 1062; Vose v. Conkling, 159 App. Div. 201, 144 Supp. 1.

<sup>2</sup>See § 2 supra; Meserole v. Hoyt, 161 N. Y. 59, 55 N. E. 274; Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946.

<sup>3</sup>Beck v. Catholic University of America, 172 N. Y. 387, 60 L. R. A. 315, 65 N. E. 204; Winne v. Winne, 166 N. Y. 263, 59 N. E. 832.

<sup>4</sup>Hughes's Sons Co. v. Smith, 217 N. Y. 662, 112 N. E. 1060.

the Court of Appeals and the appeal will be dismissed,<sup>1</sup> except in the one instance to be presently discussed.

**§ 13. Presumption of reversal on law unless specially stated.**

Although formerly a different rule prevailed in regard to judgments rendered after a jury trial,<sup>2</sup> there is now a conclusive presumption in every case that a reversal is on questions of law only, unless otherwise stated and the particular question or questions of fact upon which the reversal was had are specified in the judgment or order of reversal.<sup>3</sup> Where the order of reversal is silent as to the grounds on which it was made, the facts will be deemed to have been affirmed.<sup>4</sup>

**§ 14. Review limited on reversal on facts with judgment absolute.**

Where the Appellate Division reversed, both on the law and the facts, and granted judgment absolute for the appellant, the judgment of the Appellate Division is appealable to the Court of Appeals, but then the only question reviewable is whether a new trial should have been granted, and, in equity cases whether there is any evidence tending to support the findings made by the Appellate Division.<sup>5</sup>

**§ 15. Review on reversal and judgment absolute on law only.**

Where the reversal is on the law only and judgment absolute is granted by the Appellate Division, the Court of Appeals may review all questions of law, and if it reverses, the Court of Appeals may reinstate the judgment of the trial court.

**§ 16. When case remitted to Appellate Division.**

If, however, it holds that the Appellate Division was in error in awarding final judgment for the appellant as a matter of law, it may remit the case to the Appellate Division to pass upon the

<sup>1</sup> *Wright v. Hunter*, 46 N. Y. 409; *Spies v. Lockwood*, 165 N. Y. 481, 59 N. E. 267.

<sup>2</sup> *Wright v. Smith*, 209 N. Y. 249, 103 N. E. 154.

<sup>3</sup> Code Civ. Pro., §§ 1338, 1346; *Middleton v. Whitridge*, 213 N. Y. 499, 108 N. E. 192; *Hearst v. N. Y. C. & H. R. R. R. Co.*, 215 N. Y. 268, 109 N. E. 490.

<sup>4</sup> *Middleton v. Whitridge*, 213 N. Y. 499, 505, 108 N. E. 192.

<sup>5</sup> *Faber v. City of New York*, 213 N. Y. 411, 107 N. E. 756; *Middleton v. Whitridge*, 213 N. Y. 499, 506, 108 N. E. 192; *Hall v. O'Brien*, 218 N. Y. 50, 112 N. E. 569.

question of weight of evidence, in cases where the Appellate Division did not affirm the facts.<sup>1</sup> The reason for this procedure is that if the Court of Appeals were to reinstate the judgment of the trial court in such an instance, the defeated litigant will have been deprived of his right to a review of the facts by the Appellate Division.

### § 17. Stipulation for judgment absolute on reversal on law and new trial.

Where the reversal is on the law only and a new trial is granted, an appeal may be taken to the Court of Appeals only if the appellant stipulates that in case the determination of the Appellate Division is affirmed, judgment absolute may be rendered against him.<sup>2</sup> Otherwise, the principles just discussed, which are applicable where the Appellate Division grants judgment absolute, govern cases where the intermediate tribunal awards a new trial.

### § 18. No review of discretionary final orders in special proceedings.

The rule that the Court of Appeals can review only questions of law is applicable to appeals from final orders in special proceedings, so that questions of fact cannot be considered. As a result of this principle that the jurisdiction of the Court of Appeals is limited to a consideration of questions of law, it necessarily follows that discretionary orders are not appealable.<sup>3</sup>

### § 19. How appeal on question of law taken.

Where an order is of such a nature as might have been made either as a matter of law or in the exercise of discretion, as for example an order denying an application for a writ of mandamus,

<sup>1</sup> Galley v. Brennan, 216 N. Y. 118, 121-122, 110 N. E. 179; Junkerman v. Tilyou Realty Co., 213 N. Y. 404, 108 N. E. 190; Young v. U. S. Mortgage and Trust Co., 214 N. Y. 279, 288, 108 N. E. 418.

<sup>2</sup> Matter of Valentine, 136 N. Y. 623, 32 N. E. 635; Mundt v. Glockner, 160 N. Y. 571, 55 N. E. 297; Constitution of the State of New York, Art. VI., § 9; Code Civ. Pro., § 190, subd. 1.

<sup>3</sup> Knickerbocker Trust Co. v. Oneonta, etc., R. R. Co., 197 N. Y. 391, 90 N. E. 1111; People ex rel. Flynn v. Woods, 218 N. Y. 124, 112 N. E. 915.



an appeal lies to the Court of Appeals only if it affirmatively appears either from the order or the opinion of the Appellate Division, that it was made as a matter of law and not in the exercise of discretion.<sup>1</sup>

### § 20. Disbarment proceedings.

So, in disbarment proceedings, the power of the Court of Appeals is limited to a consideration of the questions whether the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; whether any substantial legal right of the accused has been violated; whether any prejudicial error has been committed in the reception or exclusion of testimony; and whether there is any evidence to sustain the findings on which the order is based.<sup>2</sup>

### § 21. Review limited to certified questions of law.

When an appeal is taken on questions certified by the Appellate Division, the jurisdiction of the Court of Appeals is limited to passing upon the questions so certified.<sup>3</sup> Each question must involve a single point of law and must be capable of a "yes" or "no" answer.<sup>4</sup> If a certified question requires the Court of Appeals to determine facts, the Court will decline to answer it and will dismiss the appeal.<sup>5</sup> Similarly, the Court of Appeals will not answer questions regarding the exercise of discretion by the court below, since its jurisdiction does not extend beyond reviewing questions of law.<sup>6</sup>

### § 22. Time to take appeal to Court of Appeal.

An appeal to the Court of Appeals must be taken within sixty

<sup>1</sup> *People ex rel. Flynn v. Woods*, 218 N. Y. 124, 112 N. E. 915.

<sup>2</sup> *Matter of Goodman*, 199 N. Y. 143, 92 N. E. 211; *Matter of Robinson*, 209 N. Y. 354, 103 N. E. 160; *Matter of Flannery*, 212 N. Y. 610, 106 N. E. 630; *Matter of Hawes*, 217 N. Y. 602, 111 N. E. 211.

<sup>3</sup> Code Civ. Pro., § 190, subd. 3; *Grannan v. Westchester Racing Ass'n*, 153 N. Y. 449, 47 N. E. 896.

<sup>4</sup> *Devlin v. Hinman*, 161 N. Y. 155, 55 N. E. 386.

<sup>5</sup> *Palmer v. State*, 217 N. Y. 601, 111 N. E. 211.

<sup>6</sup> *Gittleman v. Feltman*, 191 N. Y. 205, 209, 83 N. E. 969; *Doerfler v. Pottberg*, 218 N. Y. 27, 112 N. E. 445.

days after service of a copy of the judgment or order.<sup>1</sup> Where leave to appeal is required, the appeal must be taken within sixty days after such leave is granted.<sup>2</sup> Where the appeal is from an order reversing the judgment of the trial court and granting a new trial, the time to appeal does not begin to run until the judgment of reversal is also entered and notice of its entry is served on the appellant.<sup>3</sup>

### § 23. Method of taking appeal.

The appeal is taken by serving and filing a notice of appeal.<sup>4</sup> In addition the appellant must file an undertaking in the sum of \$500 for costs of the appeal, and serve a copy with notice of filing on the respondent.<sup>5</sup>

### § 24. What should be appealed from.

The appeal is taken from the judgment of the Appellate Division, where the latter court affirms the judgment of the trial court, or reverses it without granting a new trial. But where the Appellate Division reverses and grants a new trial, the appeal must be from the order of reversal.<sup>6</sup>

### § 25. Stipulation for judgment absolute.

Where the Appellate Division reverses and grants a new trial, the appellant must stipulate that judgment absolute may be rendered against him, if the order of reversal is affirmed.<sup>7</sup> The stipulation for judgment absolute is ordinarily included in the notice of appeal. An appeal may be dismissed if such a stipulation is not made where it is required.

### § 26. Stay pending appeal, how obtained.

The rules governing the obtaining of a stay pending appeal to the Court of Appeals are the same as those applicable to the securing of a stay pending appeal to the Appellate Division.<sup>8</sup>

<sup>1</sup> Code Civ. Pro., § 1325.

<sup>2</sup> Lane v. Wheeler, 101 N. Y. 17, 3 N. E. 796.

<sup>3</sup> Wingert v. Krakauer, 180 N. Y. 265, 73 N. E. 46.

<sup>4</sup> See Chap. IV., § 4.

<sup>5</sup> Code Civ. Pro., § 1326.

<sup>6</sup> Code Civ. Pro., § 1318; Wingert v. Krakauer, 180 N. Y. 265, 73 N. E. 46.

<sup>7</sup> See § 7 supra.

<sup>8</sup> Code Civ. Pro., §§ 1327-1333; see Chap. IV. § 6-9.

**§ 27. Contents of record on appeal.**

The record on appeal to the Court of Appeals consists of a copy of the record in the court below, and the order, judgment, and opinion of the court below.<sup>1</sup> The record must either be certified by the clerk of the court below, or, as is more usually done, certification may be waived by the attorneys for the respective parties.

**§ 28. Time for filing and service.**

The original return must be filed with the clerk of the Court of Appeals within twenty days after the appeal is taken.<sup>2</sup> Within forty days after the appeal is perfected, the appellant must serve on the adverse party three copies of the record.<sup>3</sup>

**§ 29. Appeal dismissed for failure to file or serve record.**

If the attorney for the appellant fails to comply with either of the foregoing requirements, the respondent may by notice in writing require the filing of the return or the service of the copies of the record, as the case may be, within ten days after the service of such notice. Then, if the record is not filed or the copies are not served, in pursuance of such notice, on proof of such facts an order may be entered in the Court of Appeals, dismissing the appeal for want of prosecution with costs.<sup>4</sup>

**§ 30. Filing printed copies with clerk before argument.**

Eighteen printed copies of the record must be filed with the clerk at least twenty days before the case is placed on the day calendar.<sup>5</sup>

**§ 31. Contents of record on appeal from judgment on verdict taken subject to the opinion of the court.**

Where the appeal is taken from a judgment rendered by the Appellate Division upon a verdict subject to the opinion of the

<sup>1</sup> Code Civ. Pro., § 1315; Rule IV. of the Rules of Practice of the Court of Appeals.

<sup>2</sup> Code Civ. Pro., § 1315.

<sup>3</sup> Rule VI. of the Rules of Practice of the Court of Appeals.

<sup>4</sup> Rules I. and VI. of the Rules of the Court of Appeals.

<sup>5</sup> Rule VII. of the Rules of the Court of Appeals.

court, the case must consist of a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the Appellate Division, settled by or under the direction of the court below. The case is annexed to the judgment roll. The case upon which the judgment below was rendered is not a part of the record on the appeal to the Court of Appeals.<sup>1</sup>

**§ 32. Bringing appeal on for argument. Notice. New calendar.**

After the return is duly filed, it is necessary to wait until the court orders a new calendar to be made up, before the appeal can be brought on for argument. When a new calendar is ordered, either side may notice the appeal for argument and upon filing the original notice with the clerk, the appeal will be placed on the new calendar. The court may also order the clerk to place on the calendar all other causes in which the returns have been filed in his office.<sup>2</sup>

**§ 33. Procedure on appeals from final orders, interlocutory judgments, and intermediate orders on certified questions.**

A different practice prevails in the case of appeals from final orders in special proceedings, and in the case of appeals from interlocutory judgments and intermediate orders on certified questions. Such appeals may be noticed for and will be heard on the first Monday of each session of the court, before the general calendar is taken up.<sup>3</sup>

**§ 34. Time for serving and filing briefs.**

The appellant must serve and file his brief at least twenty days before the cause is reached on the day calendar. Three copies must be served on the attorney for the adverse party and eighteen copies must be filed with the clerk. Within ten days after the receipt of the appellant's brief, the respondent must

<sup>1</sup> Code Civ. Pro., § 1339; *South Bay Company v. Howey*, 190 N. Y. 240, 83 N. E. 26.

<sup>2</sup> Rule XIX. of the Rules of the Court of Appeals.

<sup>3</sup> Rule XI. of the Rules of the Court of Appeals.

likewise serve and file his brief. The appellant may serve and file a reply brief within five days thereafter.<sup>1</sup>

In case of appeals entitled to be heard on the first Monday of a session,<sup>2</sup> the parties must serve and file or exchange their briefs at least two days before the commencement of the session. The same rule applies to causes upon a new general calendar to be heard during the first two weeks of any session at which such new calendar is taken up.<sup>3</sup>

### § 35. Contents of briefs.

Each party must briefly state in his points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found.<sup>4</sup>

### § 36. Disposition of cause—reversal and judgment absolute.

Upon reversal, the Court of Appeals may either grant final judgment in favor of the appellant or award a new trial, as justice requires.<sup>5</sup> Where the facts essential to the appellant's case are established, a new trial is needless, and the Court of Appeals, upon reversing the judgment appealed from, will render final judgment in favor of the appellant.<sup>6</sup>

### § 37. Reversal and new trial.

But where the Appellate Division reversed the judgment of the trial court in favor of the plaintiff and directed a dismissal of the complaint, the Court of Appeals, upon reversing the judgment of the Appellate Division, did not reinstate the original judgment, but granted a new trial because the record disclosed exceptions presenting reversible errors in the admission of evidence.<sup>7</sup>

<sup>1</sup> Rule VII. of the Rules of the Court of Appeals.

<sup>2</sup> See § 33 *supra*.

<sup>3</sup> Rule VII. of the Rules of the Court of Appeals.

<sup>4</sup> Rule VIII. of the Rules of the Court of Appeals.

<sup>5</sup> Code Civ. Pro., § 1337.

<sup>6</sup> Schoenherr v. Van Meter, 215 N. Y. 548, 553, 109 N. E. 625; Fulton v. Krull, 200 N. Y. 105, 93 N. E. 494.

<sup>7</sup> Middleton v. Whitridge, 213 N. Y. 499, 108 N. E. 192.

**§ 38. Reversal and remission to Appellate Division.**

Where the Appellate Division holds a judgment of the trial court erroneous as a matter of law, and reverses it without passing upon the question of the weight of evidence, the Court of Appeals, if it reverses the determination of the Appellate Division, will remit the case to the latter tribunal for a consideration of the facts.<sup>1</sup>

<sup>1</sup>Gombert v. Niagara Junction R. R., 217 N. Y. 635, 111 N. E. 756; Rowe v. Hendricks, 216 N. Y., 700, 110 N. E. 425.

## CHAPTER VII

## The Writ of Certiorari

SEC.

1. General nature of writ.
2. Determinations reviewable.
3. Application for rehearing prerequisite.
4. Time for application.
5. Time to review tax matters.
6. Who may apply for writ.
7. Where and how writ issues.
8. Where and how returnable.

SEC.

9. The return. Contents. Failure to file.
10. Motion to quash.
11. Hearing at Appellate Division.
12. Hearing in tax cases.
13. Printing the record for Appellate Division.
14. Questions reviewable.

## § 1. General nature of writ.

The writ of certiorari can be employed to review judicial determinations of inferior tribunals, public boards, and officers.<sup>1</sup> It, however, does not lie to review ministerial, administrative, or legislative acts.<sup>2</sup> Nor does it lie where the party seeking the writ has an adequate remedy either by appeal or by action,<sup>3</sup> or where the determination sought to be reviewed is not final.<sup>4</sup>

## § 2. Determinations reviewable.

Among the determinations reviewable by a writ of certiorari are decisions of the Public Service Commission,<sup>5</sup> the audits of

<sup>1</sup> Code Civ. Pro., § 2120; *People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187.

<sup>2</sup> *People ex rel. Republican, etc., Co. v. Wiggins*, 199 N. Y. 382, 92 N. E. 789; *People ex rel. Town of Scarsdale v. Supervisors of Westchester*, 149 App. Div. 319, 133 Supp. 760; *People ex rel. Howe v. Conway*, 59 App. Div. 329, 69 Supp. 837; *People ex rel. Dumary v. Van Alstyne*, 53 App. Div. 1, 65 Supp. 451.

<sup>3</sup> Code Civ. Pro., § 2122, subd. 2; *People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187; *People ex rel. Columbia Chemical Co. v. O'Brien*, 101 App. Div. 296, 91 Supp. 649.

<sup>4</sup> Code Civ. Pro., § 2122, subd. 1.

<sup>5</sup> *People ex rel. C. P., etc., R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517.

claims by county boards of supervisors,<sup>1</sup> the removal of a subordinate officer of a city department after a trial on charges,<sup>2</sup> commitments for contempt,<sup>3</sup> and matters of taxation.<sup>4</sup>

### § 3. Application for rehearing prerequisite.

An application for a rehearing should be made before the writ is sued out, unless the time within which such an application can be entertained has expired.<sup>5</sup>

### § 4. Time for application.

A writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding upon the relator.<sup>6</sup> But, if at the time the determination becomes final and binding, the relator is a minor, insane, or imprisoned on a criminal charge, the Appellate Division may grant the writ at any time within twenty months after the expiration of the four months' period.<sup>7</sup>

### § 5. Time to review tax matters.

But an application for a writ to review an assessment for taxation purposes must be made within fifteen days after the completion and filing of the assessment roll and the first posting or publication of the notice thereof.<sup>8</sup>

### § 6. Who may apply for writ.

An application for a writ must be made by or in behalf of a person aggrieved by the determination sought to be reviewed.<sup>9</sup> It has been held that when the Railroad Commission or the Public Service Commission grants a certificate of public convenience to a public utility company, or gives it permission to issue securities, a rival corporation is a "party aggrieved," and may seek a review

<sup>1</sup> People ex rel. Martin, Bing & Co. v. County of Westchester, 57 App. Div. 135, 67 Supp. 981.

<sup>2</sup> People ex rel. Segee v. Hayes, 106 App. Div. 563, 94 Supp. 754.

<sup>3</sup> People ex rel. Drake v. Andrews, 134 App. Div. 32, 118 Supp. 37.

<sup>4</sup> People ex rel. People's Trust Co. v. Feitner, 51 App. Div. 178, 64 Supp. 539; General Tax Law, § 290.

<sup>5</sup> Code Civ. Pro., § 2122, subd. 3.

<sup>6</sup> Code Civ. Pro., § 2125.

<sup>7</sup> *Id.*, § 2126.

<sup>8</sup> Tax Law, § 290.

<sup>9</sup> Code Civ. Pro., § 2127.



by a writ of certiorari.<sup>1</sup> A taxpayer as such may not sue out a writ of certiorari to review an audit by a town board of auditors.<sup>2</sup>

### § 7. Where and how writ issues.

The application for a writ must be made on an affidavit or a verified petition. The writ can be granted either by the Special Term or by the Appellate Division of the Supreme Court.<sup>3</sup> It is discretionary on the part of the court to require notice of the application to be given to the adverse party.<sup>4</sup> It is within the discretion of the court which grants the writ, to award a stay pending certiorari. The stay can be granted by a clause in the writ itself or by a separate order.<sup>5</sup>

### § 8. Where and how returnable.

The writ must be made returnable, within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the Supreme Court it must be made returnable at the office of the clerk of the county in which the determination to be reviewed was made.<sup>6</sup> But a writ of certiorari to review in assessment for taxation purposes must be made returnable at a Special Term of the Supreme Court within the judicial district where the assessment complained of was made.<sup>7</sup>

### § 9. The return. Contents. Failure to file.

The return to the writ of certiorari, which is to be made by the person on whom the writ is served, consists of a certified transcript of the proceedings.<sup>8</sup> A further return may be directed by the court if the return already made is defective. An omission to make a return or a further return, if one has been ordered, is a contempt of court.<sup>9</sup>

<sup>1</sup> People ex rel. N. Y. Central, etc., R. Co. v. Public Service Com., 195 N. Y. 157, 88 N. E. 261; People ex rel. N. Y. Edison Co. v. Willcox, 207 N. Y. 86, 100 N. E. 705; People ex rel. Sawyer v. R. R. Commissioners, 128 App. Div., 814, 114 Supp. 122.

<sup>2</sup> People ex rel. Cole v. Cross, 87 App. Div. 56, 83 Supp. 1083.

<sup>3</sup> Code Civ. Pro., § 2127.

<sup>4</sup> *Id.*, § 2128.

<sup>5</sup> *Id.*, § 2131.

<sup>6</sup> Code Civ. Pro., § 2133.

<sup>7</sup> Tax Law, § 291.

<sup>8</sup> Code Civ. Pro., § 2134.

<sup>9</sup> *Id.*, § 2135.

**§ 10. Motion to quash.**

If it appears upon the face of the papers upon which the writ of certiorari was granted that the relator is not entitled thereto, a motion may be made to quash the writ before the court that granted it or before the Appellate Division.<sup>1</sup> Such a motion is in the nature of a demurrer.<sup>2</sup>

**§ 11. Hearing at Appellate Division.**

The cause is heard upon the writ, the papers on which it was granted, and the return. It must be heard before the Appellate Division of the Supreme Court, irrespective of the fact as to when the writ was allowed.<sup>3</sup>

**§ 12. Hearing in tax cases.**

But a writ to review an assessment for taxation is heard at a Special Term of the Supreme Court, and testimony may be taken by the court or a referee appointed for that purpose. In New York County, such a writ is heard at Special Term, Part VI.<sup>4</sup>

**§ 13. Printing the record for Appellate Division.**

The procedure for printing the record and briefs where the cause is to be heard by the Appellate Division is the same as that applicable to appeals.<sup>5</sup>

**§ 14. Questions reviewable.**

Both questions of law and questions of weight of evidence may be reviewed.<sup>6</sup>

<sup>1</sup> People ex rel. Haggerty v. McClellan, 107 App. Div. 272, 94 Supp. 1107; People ex rel. Joline v. Willcox, 129 App. Div. 267, 113 Supp. 861, aff'd. 194 N. Y. 383.

<sup>2</sup> People ex rel. Miller v. Peck, 73 App. Div. 89, 76 Supp. 328.

<sup>3</sup> Code Civ. Pro., § 2138.

<sup>4</sup> General Tax Law, §§ 291, 292; N. Y. County, Special Term Rules, Rule VIII.

<sup>5</sup> General Rules of Practice, § 38.

<sup>6</sup> Code Civ. Pro., § 2140.

## CHAPTER VIII

### Appeals in Criminal Cases

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### § 1. Method of review.

Appeal is the only method of review in criminal cases, the Code of Criminal Procedure having abolished writs of error and certiorari.<sup>1</sup>

### § 2. Appeal statutory only.

The right of appeal from a judgment or order in a criminal case is statutory only, and, in the absence of a statute expressly authorizing an appeal in a given case, no appeal can be taken.<sup>2</sup>

### § 3. Designation of parties on appeal.

The party appealing is known as the appellant, and the adverse party as the respondent. But the title of the action is not changed in consequence of the appeal.<sup>3</sup>

### § 4. Final judgments appealable by defendant. Court to which appeal taken.

“An appeal to the *Supreme Court* may be taken by the defendant from the judgment on a *conviction* after indictment, except that, when the judgment is of *death*, the appeal must be taken *direct to the Court of Appeals*, and upon the

<sup>1</sup> Section 515, Code Crim. Pro.: *People ex rel. Dawkins v. Frost*, 129 A. D. 498, 114 N. Y. Supp. 209; *People v. Grout*, 166 A. D. 220, 151 N. Y. Supp. 322; *People ex rel. Hummel v. Trial Term*, 184 N. Y. 30; *Peo. ex rel. Wright v. Court of Sessions*, 45 Hun. 54; *People v. Palmer*, 109 N. Y. 413, 418.

<sup>2</sup> *People v. Trezza*, 128 N. Y. 529; *People v. Palmer*, 109 N. Y. 413, 418; *People ex rel. Commrs. v. Cullen*, 151 N. Y. 54, 56; *People v. Priori*, 163 N. Y. 993; *People v. Dempsey*, 31 Hun. 526, 528; *Per O'Brien, J. in People ex rel. Hummel v. Trial Term*, 184 N. Y. 34.

<sup>3</sup> Sec. 516, Code Crim. Pro.

appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty five, may be reviewed. For every purpose of an appeal herein, a conviction shall be deemed a final judgment, although sentence has been or may hereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed, and the Supreme Court upon such an appeal may review all decisions of the court upon a motion for a new trial, or in arrest of judgment. A judgment of affirmance upon any such appeal shall not operate to exclude any appellant, otherwise entitled thereto, from the right of suffrage. . . ."<sup>2</sup>

### § 5. Intermediate orders not appealable.

The practice in reviewing intermediate orders in criminal cases differs from that provided in civil cases. In a criminal case, intermediate orders which may properly be made a part of the judgment-roll are not appealable. The order will be reviewed, however, when the appeal from the final judgment is taken.<sup>2</sup>

Orders may not be reviewed by a separate appeal independent of an appeal from a judgment of conviction.<sup>3</sup>

### § 6. Rulings on demurrer.

Rulings upon a demurrer to an indictment, which has been overruled, will be reviewed on the appeal from the final judgment.<sup>4</sup>

### § 7. Appeal by people from demurrer.

Under Section 518 of the Code of Criminal Procedure an appeal may be taken *by the people* from a judgment for the defendant on a demurrer to an indictment, but the privilege of appeal from a ruling unfavorable to the defendant is not given to him. An appeal by the defendant can be taken only from the final judgment after conviction.<sup>5</sup>

<sup>1</sup> Code Crim. Pro., § 517.

<sup>2</sup> People v. Grout (No. 1), 166 A. D. 220; People v. Cox, 67 A. D. 344, 348, 73 Supp. 774.

<sup>3</sup> People v. Grout (No. 1), 166 A. D. 220; People v. Zerillo, 200 N. Y. 443; People v. Green, 137 A. D. 763, 122 Supp. 571; Matter of Jones, 181 N. Y. 389; People v. Trezza, 128 N. Y. 529; Matter of Montgomery, 126 A. D. 72, 110 Supp. 793; People v. Wendell, 128 A. D. 437, 112 Supp. 837; People v. Martin, 99 A. D. 372, 91 Supp. 486; People v. Rutherford, 47 A. D. 209, 62 Supp. 224; Peo. ex rel. Hummel v. Trial Term, 184 N. Y. 30; Ostrander v. People, 29 Hun. 513, 519.

<sup>4</sup> People v. Bates, 61 A. D. 559, 71 Supp. 123; People v. Wilson, 151 N. Y. 403.

<sup>5</sup> People v. Canepi, 181 N. Y. 398.

**§ 8. Orders relating to change of venue.**

An order denying a motion for change of venue is appealable by independent appeal.<sup>1</sup>

**§ 9. Appeal by the people to Appellate Division—when proper.**

An appeal to the Appellate Division may be taken by the people in the following cases only:

1. Upon a judgment for the defendant, on a demurrer to the indictment.

2. Upon an order of the court arresting the judgment.<sup>2</sup>

The people cannot appeal from an order granting a new trial.<sup>3</sup>

**§ 10. Appeal by people to Court of Appeals.**

The people may prosecute an appeal to the Court of Appeals from a judgment reversing a conviction when the judgment of the Appellate Division is based entirely upon questions of law.<sup>4</sup>

**§ 11. When people may not appeal.**

Where it is *not clear* from the judgment of the Appellate Division that the judgment of the trial court was reversed solely upon a question of law, the Court of Appeals has no jurisdiction to review the judgment of the Appellate Division.<sup>5</sup>

**§ 12. Cross-appeal by defendant—when permitted.**

But where the people appealed from a part of an order sustaining a demurrer to certain counts of an indictment and overruling it as to other counts in the same indictment, the defendant may take a cross-appeal from that part of the order which is unfavorable to him.<sup>6</sup>

**§ 13. Appeal by defendant—when of right—Time.**

Appeals to the Supreme Court are a matter of right.<sup>7</sup>

<sup>1</sup> People v. Jackson, 114 A. D. 697, 100 Supp. 126.

<sup>2</sup> Code Crim. Pro., § 518; People v. Firth, 157 A. D. 492; People v. Hammerstein, 155 A. D. 204; People ex rel. Hubert v. Kaiser, 206 N. Y. 46. See also Code Civil Procedure, § 2058.

<sup>3</sup> People v. Beckwith, 42 Hun. 366, 368.

<sup>4</sup> People v. Damron, 212 N. Y. 256; People v. Caffey, 182 N. Y. 257; People v. Miller, 169 N. Y. 339.

<sup>5</sup> People v. Calabur, 178 N. Y. 463. See also People v. Snyder, 44 Hun. 193.

<sup>6</sup> People v. Knapp, 206 N. Y. 379.

<sup>7</sup> Code Crim. Pro., § 520; People v. Palmer, 109 N. Y. 413, 418.

Appeals must be taken within one year after the judgment was rendered or the order entered.<sup>1</sup>

**§ 14. How to take an appeal—Notice.**

Appeals must be started by the service of a notice in writing on the clerk with whom the judgment-roll is filed, stating that the appellant appeals.<sup>2</sup> The Code of Criminal Procedure provides the only method by which an appeal can be taken, and it is therefore mandatory that this provision be carried out.<sup>3</sup>

**§ 15. Service of notice on appeal by defendant.**

If the appeal be taken by the defendant, the notice of appeal must be served on the district attorney of the county, and if the judgment be of death then the district attorney must forthwith give notice thereof to the official in whose custody the defendant may be.<sup>4</sup>

This provision is mandatory. Therefore, in a bastardy proceeding, where the defendant served the clerk of the court but failed to serve the district attorney with the notice of appeal, the appeal is defective. The fact that, under a mistaken impression of the law, defendant served the corporation counsel does not change the situation.<sup>5</sup>

**§ 16. Service of notice on appeal by people—Publication.**

The Code of Criminal Procedure provides:

“If it be taken by the people, a similar notice must be served on the defendant, if he be a resident of, or imprisoned in the city or county; or if not, on the counsel, if any, who appeared for him on the trial, if he reside or transact his business in

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<sup>1</sup> Code Crim. Pro., § 521.

<sup>2</sup> Code Crim. Pro., § 522.

<sup>3</sup> The failure to serve notice waives the right to appeal. *People v. Green*, 137 A. D. 763, 122 N. Y. Supp. 571.

If this Section is not complied with, the Appellate Court has no jurisdiction of the appeal. *People v. Green*, 137 A. D. 763, 122 N. Y. Supp. 571.

But an erroneous designation of the decision complained of as an “order” instead of “judgment” in the notice of appeal, will not defeat the appeal. *People v. Canepi*, 181 N. Y. 398.

<sup>4</sup> Code Crim. Pro., § 523.

<sup>5</sup> *Keller v. Cleary*, 56 A. D. 466, 468, 67 Supp. 862; *People v. Green*, 137 A. D. 763, 122 N. Y. Sup. 571.

the county. If the service cannot, after due diligence, be made, the Appellate Court, upon proof thereof, may make an order for the publication of the notice, in such newspaper, and for such time as it deems proper."<sup>1</sup>

"At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal becomes perfected."<sup>2</sup>

### § 17. Duty of clerk upon service of notice of appeal.

When the clerk of the court where the judgment-roll is filed is served with a notice of appeal, it is his duty to transmit, *without costs*, within ten days, to the clerk of the Appellate Court: (1) a copy of the notice of appeal; and (2) a copy of the judgment-roll.<sup>3</sup>

Within two days after receiving the notice of appeal, the clerk must notify the official stenographer that such notice has been received, and within ten days thereafter the stenographer must file the typewritten minutes.<sup>4</sup>

### § 18. Procedure in settling record—Code Provision.

"When a party intends to appeal from a judgment rendered after the trial of an issue of fact he must, except as otherwise prescribed by law or by this section, make a case and procure the same to be settled and signed, by the judge or justice, by or before whom the action was tried, as prescribed in the general rules of practice; or, in case of the death or disability of such judge or justice, in such manner as the Appellate Court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the question to be raised thereby, and also the exceptions taken by the parties making the case; and, in a case where a special question is submitted to the jury, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial, if the judgment be reversed. If it afterwards becomes necessary to separate the exceptions, the separation may be made and the exceptions may be stated with so much of the evidence, and other proceedings, as is material to the questions raised by them, in a case prepared and settled as directed by the general rules of practice, or, in the absence of directions therein, by the court, upon motion. When the defendant intends to appeal from a judgment entered after a trial of an issue of fact where he is convicted of a crime, it shall not be necessary to make a case or bill of exceptions

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<sup>1</sup> Code Crim. Pro., § 524.

Code Crim. Pro., § 525.

<sup>3</sup> Code Crim. Pro., § 456; *Matter of Willet v. Devoy*, 163 A. D. 554; see Code Crim. Pro., § 485, what judgment to consist of, pages 345-346 *post*.

<sup>4</sup> Code Crim. Pro., § 456.



as prescribed in this section, but the appeal shall be heard upon the judgment roll including the copy of the minutes of the trial filed as prescribed by section four hundred and fifty-six of the Code of Criminal Procedure. Within thirty days after the service of a notice of appeal from a judgment of conviction of a crime not punishable by death, the appellant shall procure to be printed as required by the general rules of practice the record upon which the appeal is to be heard and cause the same to be filed with the clerk of the Appellate Division of the Supreme Court in which the appeal is to be heard duly certified by the clerk of the court in which the conviction was had. If the printed copy of the record so certified is not filed within the time hereinbefore specified, the district attorney may move to dismiss the appeal upon four days' notice to the adverse party, and such appeal shall be dismissed unless the Appellate Division of the Supreme Court shall for good cause shown by order extend the time for filing the printed papers so certified as aforesaid."<sup>1</sup>

The entire record must be printed in accordance with this section, and appeals in cases, other than where the penalty is death, will be dismissed unless this rule is complied with.<sup>2</sup>

The minutes of a criminal tribunal should be written out clearly and without symbols or abbreviations. But this error alone will not work a reversal.<sup>3</sup>

Affidavits and other motion papers used on a motion for a new trial should be made part of the record and incorporated in the "case" on appeal.<sup>4</sup>

In view of § 542 of the Code of Criminal Procedure, that the court must give judgment without regard to technicalities, it is mandatory that the defendant print the stenographer's minutes of the trial; and counsel cannot stipulate that only part of the testimony and the exception taken thereto should make up the record.<sup>5</sup>

### § 19. Contents of record.

The papers which constitute the judgment-roll are as follows:

1. A copy of the minutes of a challenge interposed by the

<sup>1</sup> § 458, Code of Criminal Procedure.

<sup>2</sup> *People v. Vitusky*, 153 A. D. 879.

<sup>3</sup> *People v. Kaminsky*, 208 N. Y. 395.

<sup>4</sup> *People v. Priori*, 163 N. Y. 99. And see generally: *People v. Priori*, 163 N. Y. 101; *People v. Barrone*, 161 N. Y. 475; *People v. Browne*, 118 A. D. 38, 103 N. Y. Supp. 15; *People v. Smith*, 154 A. D. 883; *People v. Flanigan*, 174 N. Y. 366.

<sup>5</sup> *People v. Vitusky*, 153 A. D. 879.

defendant to a grand juror, and the proceedings and decision thereon;

2. The indictment and a copy of the minutes of the plea or demurrer;

3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon;

4. A copy of the minutes of the trial;

5. A copy of the minutes of the judgment;

6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment;

7. The case, if there is one;

8. The notice of appeal.<sup>1</sup>

An order denying a motion to set aside an indictment may be included in the case on appeal even though not specifically mentioned in Section 485 of the Code of Criminal Procedure.<sup>2</sup>

#### § 20. Time for filing record.

The appellant must file the printed record on appeal with the clerk of the Appellate Division within thirty days after the service of the notice of appeal.<sup>3</sup>

#### § 21. Effect of failure.

For failure to file the printed case on appeal within thirty days after the notice of appeal is served, a motion may be made to dismiss the appeal. Good cause must be shown why the time should be extended or else the motion will be granted.<sup>4</sup>

This provision is strictly enforced where a certificate of reasonable doubt has been granted.<sup>5</sup>

A motion to dismiss will not be granted, however, where it clearly appears that the delay was unintentional and without fault of the defendant.<sup>6</sup>

<sup>1</sup> Code Crim. Pro., § 485; *Matter of Willett v. Devoy*, 163 A. D. 554.

<sup>2</sup> *People ex rel. Hummel v. Trial Term*, 184 N. Y. 33.

<sup>3</sup> Code Crim. Pro., § 458.

<sup>4</sup> *People v. Debiase*, 154 A. D. 128.

<sup>5</sup> *People v. Smith*, 154 A. D. 883.

<sup>6</sup> *People v. Vitusky*, 153 A. D. 879.

**§ 22. Appeal may not be dismissed on mere technicality.**

When the appeal is irregular in a *substantial particular*, but *not otherwise*, the court may, upon five days' notice, order the appeal dismissed.<sup>1</sup>

**§ 23. Grounds for dismissing appeal.**

The court may upon like notice dismiss an appeal on the following grounds:

1. If the return be not made, as provided in section five hundred and thirty-two, unless for good cause they enlarge the time for that purpose.<sup>2</sup>

2. If the appeal be not brought on for argument by the appellant as promptly after the return has been made as the circumstances of the case will reasonably admit.<sup>3</sup>

An appeal will not be dismissed in a capital case for lack of diligent prosecution, but new counsel will be assigned to prosecute the appeal.<sup>4</sup>

But in other criminal cases the appeal will be dismissed if not prosecuted in accordance with this section.<sup>5</sup>

The Court of Appeals strongly condemns counsel for delaying the bringing on for argument appeals in criminal cases.<sup>6</sup>

**§ 24. Stay of execution—how obtained. Certificate of reasonable doubt.**

An appeal to the Appellate Division of the Supreme Court, from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing with the notice of appeal, a certificate of the court in which such conviction was had or such determination was made, provided said court was a court of record or of the Supreme Court, that in the opinion of said court there is reasonable doubt whether the judgment should stand, but not otherwise. Such certificate must recite briefly the particular rulings believed

<sup>1</sup> Code Crim. Pro., § 533.

<sup>2</sup> *People v. Harvey*, 208 N. Y. 552.

<sup>3</sup> Code Crim. Pro., § 534.

<sup>4</sup> *People v. Sprague*, 215 N. Y. 266.

<sup>5</sup> *People v. Bryant*, 214 N. Y. 650; *People v. Stilwell*, 214 N. Y. 651.

<sup>6</sup> *People v. Nelson*, 188 N. Y. 234; *People v. Triola*, 174 N. Y. 324.

to have been erroneous together with any other grounds upon which it was granted. And the Appellate Court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not, in the court below.<sup>1</sup>

Before a stay of execution pending the determination of an appeal can be procured a certificate of reasonable doubt must be procured from a justice of the Supreme Court sitting at special term, pursuant to Section 529, Code Criminal Procedure. The court in which the conviction was had may also grant the certificate, if said court is a court of record.<sup>2</sup>

The application for a certificate of reasonable doubt may be brought on by an order to show cause.<sup>3</sup>

The motion should be addressed to and determined by a regularly appointed special term and not by a justice of the Supreme Court, even though he be the justice sitting at that term.<sup>4</sup>

The moving papers need not contain a copy of the minutes of the trial, it is enough if the minutes can be used on the motion.<sup>5</sup>

It is mandatory upon the justice sitting at that special term to hear the application, and he may not send it to another justice for hearing.<sup>6</sup>

It need not appear on such application that the judgment will be reversed. It is enough that a question of law or fact is raised sufficient for the consideration of the Appellate Court. But reasonable doubt must exist as to the correctness of the judgment before a certificate will be granted.<sup>7</sup>

<sup>1</sup> Code Crim. Pro., § 527.

<sup>2</sup> *People v. Tirnauer*, 77 Misc. 387, 136 Supp. 833; *People v. Hyde*, 78 Misc. 480.

<sup>3</sup> *People v. Tirnauer*, 77 Misc. 387, 136 Supp. 833.

<sup>4</sup> *People v. Martin*, 92 Misc. 107.

<sup>5</sup> *People v. Tirnauer*, 77 Misc. 387, 136 Supp. 833.

<sup>6</sup> *People v. Grout*, 91 Misc. 451.

<sup>7</sup> *People v. Hummel*, 49 Misc. 136, 98 Supp. 713; *People v. Emerson*, 6 N. Y. Cr. Rep. 157, 5 Supp. 374; *People v. Valentine*, 19 Misc. 555, 44 Supp. 903; *People v. Wentworth*, 3 N. Y. Cr. Rep. 111.

Pending the determination of the hearing of an application for a certificate of reasonable doubt, a defendant may procure a temporary stay of execution, but he may not be released on bail.<sup>1</sup>

**§ 25. Certificate not granted except on notice to district attorney.**

"Upon an appeal on a conviction of felony or misdemeanor an application for a certificate of reasonable doubt made pursuant to section five hundred and twenty-seven of this code must be heard and determined either by the court in which such conviction was had, provided said court is a court of record, or by a regularly appointed special term of the Supreme Court held within the judicial district in which the conviction was had. An application for such a certificate, made pursuant to section five hundred and twenty-eight of this code, must be made either to a judge of the Court of Appeals or to a justice of the Appellate Division of the Supreme Court from the judgment of which the appeal is taken. In either case such an application must be founded upon the record of the cause and a notice of motion duly served on the district attorney of the county where the conviction was had, or upon such record and an order to show cause granted either by the trial judge or by a justice of the Supreme Court; the moving papers must contain a formal specification of the particular rulings alleged to have been erroneous and of any other grounds upon which the application is based and at least two days' notice of the time and place for hearing such application must be given the district attorney of the county in which the conviction was had. The judge or justice granting such order to show cause may in his discretion stay execution of the judgment of conviction until the determination of such application. When an application for such certificate shall have been made to and denied by the court in which such conviction was had or by the Supreme Court or in case of an appeal to the Court of Appeals by a judge of that court or a justice of the Appellate Division of the Supreme Court, no other application for such certificate shall be made. If an appeal to the Appellate Division of the Supreme Court shall not be brought on for argument by the defendant at the next term of the Appellate Division begun not less than ten days after the granting of such certificate, or if an appeal to the Court of Appeals shall not be brought on for argument by the defendant when the Court of Appeals shall have been in actual session for fifteen days after the granting of such certificate, the district attorney on two days' notice to the defendant may apply to the court, judge, or justice, who granted the certificate, or to any judge or justice of the Appellate Court in which the appeal is pending, for an order vacating the certificate, and upon the entry of such an order the judgment shall be executed as though a certificate had never been granted to the defendant."<sup>2</sup>

**§ 26. No stay when people appeal.**

Section 526, Code of Criminal Procedure, provides:

<sup>1</sup> People ex rel. Hummel v. Reardon, 189 N. Y. 164, revg. 112 A. D. 866.

<sup>2</sup> Code Crim. Pro., § 529.

"An appeal taken by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed."

The word "conviction" as used in Section 526 of the Code of Criminal Procedure imports judgment and not simply the verdict.<sup>1</sup>

### § 27. Effect of stay.

"When a stay of execution is obtained pursuant to Sections 527 and 528 of the Code of Criminal Procedure, the effect of the stay is as follows:

"(1) If the judgment imposes penal servitude, the sheriff must hold the defendant in custody until he is admitted to bail, as provided in Section 555 of the Code of Criminal Procedure;

"(2) If the judgment imposes a fine, the collection of the fine is stayed on condition that an undertaking is executed and the collection of the fine is not stayed until such undertaking is executed; and

"(3) If the judgment imposes penal servitude and the payment of a fine, and the defendant furnishes an undertaking conditioned upon his surrender and the payment of the fine imposed, if the judgment is affirmed, when such judgment is affirmed and the defendant surrenders himself, the surety on the bond is still liable for the fine."<sup>2</sup>

If the execution of the judgment has commenced after the certificate is granted, further execution of the judgment is stayed.<sup>3</sup>

### § 28. Scope of review in Appellate Division—Reëxamination of facts.

The power of the Appellate Division in deciding appeals in criminal cases is very broad. It may reverse a conviction for errors of law, on the ground that it is against the weight of evidence, or on the ground that justice requires a new trial. The court will reverse the judgment if an examination of the evidence shows that there was as a matter of law no corroborating evidence. No specific exception is necessary. It is enough if the defendant moves at the end of the case to dismiss the indictment. That motion is sufficient to bring up all the questions for the consideration of the Appellate Division.<sup>4</sup>

When the evidence is not legally corroborated and an examina-

<sup>1</sup> *People v. Fabian*, 192 N. Y. 449.

<sup>2</sup> *Code Crim. Pro.*, § 530; *People v. Connolly*, 88 A. D. 302, 84 N. Y. Supp. 617.

<sup>3</sup> *Code Crim. Pro.*, § 531.

<sup>4</sup> *People v. Kathan*, 136 A. D. 303, 310, 120 Supp. 1096.

tion of the facts shows grave doubt of the defendant's guilt, a new trial will be ordered.<sup>1</sup>

When all the essentials of the crime charged are not clearly proven, a new trial will be ordered.<sup>2</sup>

The Appellate Division will examine the facts in a criminal case and will order a new trial in a proper case.<sup>3</sup>

### § 29. Reversal where justice requires it.

Where justice requires a new trial, although no prejudicial error was committed during the course of the trial, the Appellate Division may in its discretion order a new trial whether or not an exception was taken.<sup>4</sup>

### § 30. No reversal where evidence is doubtful.

But the court has no power to disturb a verdict merely because it may entertain a reasonable doubt upon the evidence, as that is a question for the jury.<sup>5</sup>

Ordinarily a judgment of conviction in a criminal case will not be reversed when the evidence is conflicting, except when the Appellate Court is able to detect some reason why the version adopted by the jury should be rejected.<sup>6</sup>

### § 31. Prejudicial remarks of trial judge.

When remarks of the trial court are erroneous and the prosecution fails to show that they are not prejudicial, the Appellate Division may order a new trial.<sup>7</sup>

### § 32. How appeal is brought on for argument. In Appellate Division.

An appeal to the Appellate Division of the Supreme Court may be brought to argument by either party, on ten days' notice,

<sup>1</sup> People v. Farina, 134 A. D. 110.

<sup>2</sup> People v. Masterson, 96 A. D. 610, 88 Supp. 747.

<sup>3</sup> People v. Cricuoli, 157 A. D. 201, 204.

<sup>4</sup> People v. Naimark, 154 A. D. 760; People v. Criscuoli, 164 A. D. 119; People v. Friedman, 149 A. D. 873; People v. Blatt, 136 A. D. 717.

<sup>5</sup> People v. Long, 150 A. D. 500; People v. Taylor, 138 N. Y. 398; People v. Rodewald, 177 N. Y. 408, 420.

<sup>6</sup> People v. Poulin, 207 N. Y. 78.

<sup>7</sup> People v. Chartoff, 72 A. D. 555, 75 Supp. 1088.

on any day, at a term held in the department in which the original judgment was given.

### § 33. Jurisdiction of Court of Appeals—Scope of review.

An appeal may be taken from a judgment or order of the Appellate Division of the Supreme Court to the Court of Appeals in the following cases, and no other:

1. From a judgment affirming or reversing a judgment of conviction;

2. From a judgment affirming or reversing a judgment for the defendant, on a demurrer to the indictment, or from an order affirming, vacating or reversing an order of the court arresting judgment;

3. From a final determination affecting a substantial right of a defendant.<sup>1</sup>

In cases where the defendant is sentenced to be executed, an appeal from the judgment of the trial court is to be taken directly to the Court of Appeals.

### § 34. Examination of facts.

The constitutional provision that no unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain a finding of fact or a verdict shall be reviewed by the Court of Appeals (Const. Art. 6, Sec. 9) is unqualified in its language and precludes a review thereof by the Court of Appeals in criminal cases, excepting capital cases.<sup>2</sup>

### § 35. Powers of Court of Appeals.

The Court of Appeals has no power except such as is conferred upon it by the Constitution or Statute.<sup>3</sup>

Therefore, the Court of Appeals cannot under this section review an order made in a proceeding which was not criminal in

<sup>1</sup> Sec. 519, Crim. Code.

<sup>2</sup> *People v. Bresler*, 218 N. Y. 567; *People v. Thompson*, 198 N. Y. 396; *People v. Mingley*, 190 N. Y. 61; *People v. Maggiore*, 189 N. Y. 514; *People v. Huson*, 187 N. Y. 97; *People v. De Garnio*, 179 N. Y. 130; *People v. Helmer*, 154 N. Y. 596, 599; *People v. Boas*, 92 N. Y. 560, 563.

<sup>3</sup> *Croveno v. Atlantic Ave. R. R. Co.*, 150 N. Y. 225, 228.



its nature, but was simply an application to the court to strike a paper alleged to be scandalous from the files of the court.<sup>1</sup>

When it does not appear from the order that the same was granted as a matter of law, but rather in the discretion of the court below, the Court of Appeals will not review the order.<sup>2</sup>

### § 36. Orders granting or refusing new trials not appealable.

An order granting or denying a motion for a new trial, after the Court of Appeals has affirmed the judgment, is not appealable.<sup>3</sup>

### § 37. When appeal not a matter of right—Magistrate Courts.

After the Appellate Division has affirmed a judgment of conviction obtained in the Magistrates' Court, an appeal, as a matter of right to the Court of Appeals, does not lie. Such appeal may be taken only by permission.<sup>4</sup>

### § 38. Application for leave to appeal.

After an application for leave to appeal to the Court of Appeals has been denied by a justice of that court, and thereafter a similar application is made to another judge of the same court who grants same, the order will be set aside.<sup>5</sup>

### § 39. Stay pending appeal to Court of Appeals—how obtained.

#### No certificate in capital cases.

"An appeal to the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the Court of Appeals or of a justice of the Appellate Division of the Supreme Court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise. When the judgment is of death, an appeal to the Court of Appeals stays the execution as of course until the determination of the appeal."<sup>6</sup>

### § 40. Scope of review in Court of Appeals. Exceptions essential.

In the absence of an exception to the ruling, the Court of

<sup>1</sup> Matter of Jones, 181 N. Y. 389, 391.

<sup>2</sup> People v. Poucher, 99 N. Y. 610.

<sup>3</sup> People v. Canepi, 181 N. Y. 398; People v. Zerillo, 200 N. Y. 443; People ex rel. Breslin v. Lawrence, 107 N. Y. 607; People v. Mayhew, 151 N. Y. 607, 610.

<sup>4</sup> People v. Ekerold, 211 N. Y. 386.

<sup>5</sup> Carlisle v. Barnes, 183 N. Y. 272.

<sup>6</sup> Code of Crim. Procedure, § 528.

Appeals cannot review a question of law in a criminal case, other than capital.<sup>1</sup>

The fact that the alleged error involves a constitutional right of the defendant does not increase the power of review of the Court of Appeals.<sup>2</sup>

Although the Appellate Division has the power to grant a new trial, where justice requires it whether or not an exception was taken during the trial, the Court of Appeals cannot grant a new trial unless such exception was duly taken.<sup>3</sup>

#### § 41. Scope of review in capital cases—No exceptions required.

When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.<sup>4</sup>

In a capital case the Court of Appeals has the power to grant a new trial if it be satisfied that the verdict is against the weight of evidence, or against the law, or when justice requires it.<sup>5</sup>

The Court of Appeals has the power to order a new trial in a capital case when justice requires it, even when no exception is taken during the progress of the trial.<sup>6</sup>

But this rule is not applicable in cases other than capital,

<sup>1</sup> *People v. Tomlins*, 213 N. Y. 240, 245 (capital case); *People v. Pindar*, 210 N. Y. 191; *People v. Huson*, 187 N. Y. 97; *People v. Bresler*, 218 N. Y. 567; *People v. Grossman*, 168 N. Y. 47, 52; *People v. Guidici*, 100 N. Y. 503, 508; *People v. Hovey*, 92 N. Y. 554; *People v. Boas*, 92 N. Y. 560; *People v. Brooks*, 131 N. Y. 321; *People v. D'Argencour*, 95 N. Y. 624; *People v. Donovan*, 101 N. Y. 632.

<sup>2</sup> *People v. Sherlock*, 166 N. Y. 180.

<sup>3</sup> *People v. Bresler*, 218 N. Y. 567; *People v. Hovey*, 92 N. Y. 554; *People v. Boas*, 92 N. Y. 560; *People v. D'Argencour*, 95 N. Y. 624, 631; *People v. Donovan*, 101 N. Y. 632.

<sup>4</sup> Code Crim. Pro., § 528; *People v. Becker*, 210 N. Y. 274.

<sup>5</sup> *People v. Jung Hing*, 212 N. Y. 393, 404, 405; *People v. Eng Hing*, 212 N. Y. 373, 384; *People v. Constantino*, 153 N. Y. 24.

<sup>6</sup> *People v. Watson*, 216 N. Y. 569; *People v. Pindar*, 210 N. Y. 197; *People v. Schermerhorn*, 203 N. Y. 57; *People v. Gerdvine*, 210 N. Y. 184. See also Code Crim. Pro., § 542.

where the errors assigned are only errors of law. Such errors must be reached by exceptions duly taken in the method provided by law.<sup>1</sup>

**§ 42. When Court of Appeals may not examine facts—unanimous decision.**

A unanimous decision of affirmance by the Appellate Division precludes the Court of Appeals from any examination of the facts.<sup>2</sup>

**§ 43. Time limit in death cases in Court of Appeals.**

An appeal to the Court of Appeals may, in the same manner, be brought to argument by either party on any day in term, and, where the judgment appealed from is of death, the appeal must be brought on for argument within six months from the taking of such appeal, unless the Court, for good cause shown, shall enlarge the time for that purpose.<sup>3</sup>

**§ 44. Insanity of defendant—hearing postponed.**

When a defendant under sentence of death becomes insane pending the appeal, the argument of the case on the appeal must be postponed.<sup>4</sup>

**§ 45. When appeal delayed.**

Where the judgment appealed from is of death it shall be the duty of the district attorney to expedite the appeal, which shall take precedence of all other appellate business in his office; and if for any reason the appeal be not brought on for argument within six months from the time when it is taken the district attorney shall forthwith communicate to the Governor a written statement of the reasons for the delay.<sup>5</sup>

**§ 46. Notice of argument—on whom served.**

If a counsel, within five days after the appeal, has given notice to the district attorney, that he appears for the defendant,

<sup>1</sup> *People v. Cummins* 209 N. Y. 283; *People v. Carlin*, 194 N. Y. 448; *People v. Grossman*, 168 N. Y. 47.

<sup>2</sup> *People v. Grossman*, 168 N. Y. 47.

<sup>3</sup> Code Crim. Pro., § 536. See also Rules of the Court of Appeals, No. IX.

<sup>4</sup> *People v. Skwirsky*, 213 N. Y. 151.

<sup>5</sup> Code Crim. Pro., § 536 a.

notice of argument must be served on him, instead of the defendant; otherwise notice must be served as the court may direct.<sup>1</sup>

#### § 47. Appellant must furnish papers on appeal.

When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment-roll, except where the judgment is of death. If he fails to do so, the appeal must be dismissed, unless the court otherwise direct.<sup>2</sup>

#### § 48. When judgment affirmed without argument.

Judgment of affirmance may be given, without argument, if the appellant fail to appear, or where the judgment appealed from is of death and it shall not have been brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall have enlarged said time. But judgment of reversal can only be given upon argument, though the respondent fail to appear.<sup>3</sup>

#### § 49. No dismissal in capital cases.

See also Court of Appeals, Rules, No. XV.

“When it appears that the delay in bringing on an appeal for argument in a capital case is the fault of counsel assigned to defend the defendant, the Court of Appeals will not grant a motion to dismiss the appeal, but will discharge negligent counsel and appoint other counsel to defend.”<sup>4</sup>

In a capital case where counsel neglect to bring the appeal on for argument in accordance with this section, his application for compensation will be denied.<sup>5</sup>

#### § 50. Number of counsel in death cases.

In death cases two counsel for each side may be heard. In all other cases it is discretionary with the court as to number of

<sup>1</sup> Code Crim. Pro., § 537.

<sup>2</sup> Code Crim. Pro., § 538.

<sup>3</sup> Code Crim. Pro., § 539.

<sup>4</sup> *People v. Sprague*, 215 N. Y. 266; *People v. Nelson*, 188 N. Y. 234; *People v. Hill*, 197 N. Y. 532 (enlarging time within which to bring on appeal); *People v. Nelson*, 188 N. Y. 234 (where assignment of counsel revoked because of delay); *People v. Sprague*, 215 N. Y. 266 (assignment of counsel revoked, but motion to dismiss appeal denied.)

<sup>5</sup> *People v. Campanelli*, 214 N. Y. 37; see also *People v. Dunn*, 214 N. Y. 647.

counsel that may be heard for each side. The defendant is entitled to the closing argument.<sup>1</sup>

### § 51. What is reversible error—Instances.

After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.<sup>2</sup>

The Appellate Courts faithfully follow this provision which in substance prohibits reversal for errors which do not prejudice the substantial rights of the defendant.<sup>3</sup>

In the following recent cases the Appellate Court had occasion to construe the meaning of this section and to decide whether errors assigned were technical or substantial:

People v. Gibson, 218 N. Y. 70. (Admissibility of evidence. Judgment affirmed.) People v. Manganaro, 218 N. Y. 9. (Admissibility of evidence. Judgment affirmed.) People v. Curtis, 217 N. Y. 304. (Error in admissibility of evidence. Judgment reversed.) People v. Schmidt, 216 N. Y. 324, 341. (Charge to jury on defense of insanity. Judgment affirmed.) People v. Skwirsky, 216 N. Y. 471. (Corroboration of testimony of accomplice. Judgment affirmed.) People v. Roach, 215 N. Y. 592. (Evidence properly excluded. Judgment affirmed.) People v. Mirandi, 213 N. Y. 600. (Admissibility of evidence substantial. Judgment reversed.) People v. Willett, 213 N. Y. 368, 388. (Admissibility of evidence. Judgment affirmed.) People v. Heineman, 211 N. Y. 475. (Erroneous charge to jury. Judgment reversed.) People v. Gerdvine, 210 N. Y. 184. (Erroneous charge. Judgment reversed.) People v. Harris, 209 N. Y. 70, 79. (Admissibility of evidence. Judgment reversed.) People v. Cummins, 209 N. Y. 283. (Admissibility of evidence and charge to jury. Judgment affirmed.) People v. Bertolini, 171 A.D. 460, 157 N. Y. Supp. 599. (Identification of defendant. Charge to jury. Judgment reversed.) People v. Maestry, 167 A. D. 266, 152, N. Y. Supp. 767. (Improper questioning by prosecuting attorney. Judgment reversed.) People v. Barbey, 164 A. D. 756, 149 Supp. 823. (Transferring case to trial court, form of order. Judgment affirmed.) People v. Rubin, 163 A. D. 845, 146 Supp. 882, affd. 214 N. Y. 612. (Corroboration of evidence. Judgment affirmed.) People v. Markheim, 162 A. D. 859, 148 Supp. 155. (Erroneous charge. Judgment affirmed.) People v. Freeman, 160 A. D. 640, 145 Supp. 1061. (Corroboration of evidence. Judgment affirmed.) People v. Koppman, 158 A. D. 660, 143 Supp. 919. (Erroneous charge as to character. Judgment reversed.)

<sup>1</sup> Sec. 540, Code Crim. Pro.

<sup>2</sup> Code of Crim. Pro., § 542.

<sup>3</sup> People v. Sprague, 217 N. Y. 373; People v. Ferola, 215 N. Y. 285; People v. Sarzano, 212 N. Y. 231; People v. De Villiers, 170 A. D. 690.

### § 52. Judgment in Appellate Court.

“Upon hearing the appeal the Appellate Court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the judgment or finding; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal, may, if necessary or proper, order a new trial. If the judgment of death is affirmed, the Court of Appeals, by an order under its seal, signed by a majority of the judges, shall fix the week during which the original sentence of death shall be executed, and such order shall be sufficient authority to the agent and warden of any state prison for the execution of the prisoner at the time therein specified and the agent and warden must execute the judgment accordingly.”<sup>1</sup>

### § 53. Power to re-sentence.

In cases where the defendant has been convicted and judgment is subsequently corrected, the Appellate Division may resentence the defendant, although he is not present in court.<sup>2</sup>

### § 54. Error after verdict.

Where an error is committed after the verdict is rendered, it does not affect the validity of the conviction and the proper procedure is to resentence the defendant, or otherwise correct the error.<sup>3</sup>

In a criminal prosecution brought to abate a nuisance, the Appellate Court has the power to modify the judgment of conviction.<sup>4</sup>

### § 55. Effect of granting new trial.

Where a judgment of conviction is reversed and a new trial ordered the effect of ordering a new trial is as though no previous trial had been had.<sup>5</sup>

Where a defendant is tried on a charge of homicide and is convicted of the crime of manslaughter, the Appellate Division

<sup>1</sup> Code Crim. Pro., § 543.

<sup>2</sup> *People v. Scheuren*, 148 A. D. 324.

<sup>3</sup> *People v. Nesce*, 201, N. Y. 111; *People v. Bork*, 96 N. Y. 188; *People v. Bradner*, 107 N. Y. 1.

<sup>4</sup> *People v. High Ground Dairy Co.*, 166 A. D. 81.

<sup>5</sup> Code Crim. Pro., § 544; *People v. McGrath*, 202 N. Y. 445, 450; *People v. Palmer*, 109 N. Y. 413, 419.

has the power to reverse the judgment and order a new trial, and the defendant is not held to be acquitted of the graver crime.<sup>1</sup>

When judgment is reversed without ordering a new trial, the Appellate Court must direct that the defendant be discharged from custody, his bail exonerated, and, if money is deposited in lieu of bail, that the same be refunded to defendant.

**§ 56. General reversal—discharge of defendant to be ordered.**

If a judgment against the defendant be reversed, without ordering a new trial, the Appellate Court must direct, if he be in custody, that he be discharged therefrom, or, if money be deposited instead of bail, that it be refunded to the defendant.<sup>2</sup>

This provision is mandatory.<sup>3</sup>

Where a fine has been imposed and the Appellate Division reversed the judgment and orders a new trial, such fine will not be remitted if an appeal to the Court of Appeals is pending.<sup>4</sup>

**§ 57. How judgment of Appellate Court entered and remitted.**

"When the judgment of the Appellate Court is given, it must be entered in the judgment book, and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days."<sup>5</sup>

When a judgment of conviction is reversed and a new trial ordered, a certified copy of the judgment of the Appellate Court is remitted to the lower court where the judgment of reversal must be entered.<sup>6</sup>

Until the judgment of reversal is actually entered in the lower court, the Appellate Court has jurisdiction.<sup>7</sup>

When the Appellate Court reverses a ruling of the trial court

<sup>1</sup> *People v. Wheeler*, 79 A. D. 396, 79 Supp. 454.

<sup>2</sup> Code Crim. Pro., § 545.

<sup>3</sup> *People v. Mershon*, 46 A. D. 629, 61 Supp. 1144.

<sup>4</sup> *People v. Cornell*, 65 Misc. 452, 121 Supp. 972.

<sup>5</sup> Code Crim. Pro., § 547; *People v. Mead*, 125 A. D. 7, 9, 109 Supp. 163.

<sup>6</sup> *People v. Moore*, 96 A. D. 56, 89 Supp. 83.

<sup>7</sup> *People v. Hill*, 73 Hun. 473.

sustaining the demurrer to the indictment, the proper practice is to remit the proceedings to the clerk of the court below and permit the defendant to plead over.<sup>1</sup>

### § 58. Jurisdiction of Appellate Court after judgment.

"After the certificate of the judgment has been remitted, as provided in Section five hundred and forty-seven, the Appellate Court has no further jurisdiction of the appeal, or of the proceedings thereon; except as provided in section five hundred and forty-three all orders, which may be necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed."<sup>2</sup>

After the judgment of the Appellate Court is certified to the trial court all further proceedings are had in the lower court.<sup>3</sup>

But this section does not deprive an Appellate Court of the power to correct or amend its own judgment to conform to its written opinion.<sup>4</sup>

### § 59. Appeals from convictions in Magistrates' Courts.

Appeals from convictions had in the Magistrates' Courts are not appealable as a matter of right. An affidavit alleging the errors complained of must be submitted within sixty days after judgment or sixty days after the commitment to the county judge or a justice of the Supreme Court or, in the city and county of New York, to a judge authorized to hold a court of general sessions or in Albany to the recorder.<sup>5</sup>

If in the opinion of the judge the questions raised should be decided by the County Court, he must indorse on the affidavit an allowance of the appeal to that court.<sup>6</sup>

### § 60. Notice of appeal.

Within five days after such appeal is allowed, a copy of said affidavit, together with a notice that the appeal has been allowed,

<sup>1</sup> People v. Mead, 125 A. D. 7, 9, 109 Supp. 163.

<sup>2</sup> Code Crim. Pro., § 549.

<sup>3</sup> People v. Mershon, 46 A. D. 629, 61 Supp. 1144.

<sup>4</sup> People v. Hill, 73 Hun. 473.

<sup>5</sup> Code Crim. Pro., §§ 750, 751.

<sup>6</sup> Code Crim. Pro., § 752.



must be served upon the district attorney of the county where the appeal is to be heard.<sup>1</sup>

### § 61. Time for return.

The magistrate or court rendering the judgment must make a return to all the matters stated in the affidavit, and must cause the affidavit and return to be filed in the office of the county clerk within ten days after the service of the affidavit and allowance of the appeal.<sup>2</sup>

### § 62. Appeal lies to Court of General Sessions—To Appellate Division—when.

An appeal from a judgment of conviction before a city magistrate lies to the Court of General Sessions.

But where the city magistrate is holding a Court of Special Sessions, the appeal lies to the Appellate Division.<sup>3</sup>

### § 63. Powers of inferior criminal courts.

In New York City the powers of the inferior criminal courts are defined in the Inferior Criminal Courts Act of the City of New York. (Laws 1910, chap. 659.)

Appeals from city magistrates are regulated by § 94 of the Inferior Criminal Courts Act as amended by Chap. 531 of the Laws of 1915 and reads as follows:

“All provisions of law conferring the right of appeal and prescribing the procedure on appeal to the Court of General Sessions of the peace in the County of New York from any judgment, order or other determination of a city magistrate, including a commitment under section four hundred and eighty-six of the penal law or of any court held by a city magistrate in force when this act takes effect, shall apply to and regulate appeals, and the right of appeal hitherto existing is hereby preserved and continued. The right of appeal from any judgment, order or other determination of a city magistrate in any county other than the County of New York, to the county court of the county where the said judgment, order or other determination is made, is hereby preserved and con-

---

<sup>1</sup> Code Crim. Pro., § 752; *People v. Cimini*, 53 Misc. 525, 105 Supp. 476.

<sup>2</sup> Code Crim. Pro., § 756; *People v. Solomon*, 57 Misc. 288; *People v. Giles*, 152 N. Y. 136; *People v. McGann*, 43 Hun. 57.

<sup>3</sup> Inferior Criminal Courts Act (Laws 1910 c. 659) § 40; *People v. Sauter*, 96 Misc. 109, 160 N. Y. Supp. 1031.

tinued. Upon the reversal of any judgment, order or other determination of a city magistrate the Court of General Sessions or a county court may send back the cause for a new trial to the city magistrates' court."

But this section does not authorize an appeal to the Court of General Sessions when the city magistrate is holding a court of general sessions.<sup>1</sup>

The practice on appeal from convictions in the Magistrates' Courts to the Court of General Sessions is the same as appeals from the Municipal Courts to the Appellate Term.

<sup>1</sup> *People v. Sauter*, 160 N. Y. Supp. 1031, 96 Misc. 109.

**APPENDIX**

**FEDERAL FORMS**



## APPENDIX

### LIST OF FORMS

1. Petition for appeal in an equity suit.
2. Assignment of errors.
3. Another form of assignment of errors in an equity suit involving *res adjudicata*.
4. Petition for writ of error in a common law civil action.
5. Assignment of errors in a common law civil action.
6. Bond on appeal or writ of error.
7. Citation on appeal or writ of error in Supreme Court to be signed by Judge allowing the appeal or writ of error. For Citation in Court of Appeals use Form No. 22.
8. Writ of error to Federal Courts.
9. Form of return of writ of error.
10. Contempt. Petition for writ of error and bail.
11. Assignment of errors in Contempt Case for violation of an injunction.
12. Petition for writ of error in criminal case for *supersedeas* and bail.
13. Assignment of errors in criminal case.
14. Order allowing writ of error and admitting defendant to bail.
15. Bail bond on writ of error.
16. Common law—Bill of exceptions.
17. Forms on appeal in Habeas Corpus matters. Deportation Case.
18. Assignment of errors—Habeas Corpus case.
19. Order allowing appeal and releasing prisoner on bail pending appeal in a Habeas Corpus case.
20. *Supersedeas* Bail Bond.
21. Appeal bond for costs. Habeas Corpus case.
22. Citation. Habeas Corpus case.
23. Certificate of District Judge certifying the question of jurisdiction.
24. Bankruptcy. Original petition to revise.
25. Order granting leave to file petition and ruling respondent to answer.
26. Answer to petition to revise.
27. Petition on behalf of the Government for writ of error with assignment of errors.
28. Another form of assignment of errors by the Government under the Tucker Act.
29. *Præcipe* for record. Under Rule 8 of the U. S. Supreme Court and Rule . . . . . of Court of Appeals.
30. Notice of filing *præcipe*. Under Rule 8 of the U. S. Supreme Court.
31. Form for Designating other parts of record.
32. Certificate of the clerk to the correctness of the record as per *præcipe*.
33. Stipulation to omit certain parts from printed record to avoid duplication.
34. Order for appearance.
35. Notice designating part of the record under Rule 10, Subd. 9, of the Supreme Court of the United States.
36. Designating part of the record under Rule 10, Subd. 9, of the Supreme Court of the United States by appellant or plaintiff in error.
37. Designating part of the record under Rule 10, Subd. 9, of the Supreme Court of the United States by appellee or defendant in error.
38. Form of certificate on motion to

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- docket and dismiss appeal under Rule 9 of Supreme Court of the United States.
- 39. Order for mandate.
- 40. Mandate to Circuit Court of Appeals.
- 41. Mandate to District Court of United States.
- 42. Bill of costs.
- 43. Petition for writ of error—Supreme Court to Highest Court of State.
- 44. Assignment of errors. (Constitutional questions, etc.)
- 45. Order allowing writ of error.
- 46. Bond.
- 47. Citation.
- 48. Writ of error.
- 49. Certificate of clerk of the State Court certifying the lodgment of certain documents.
- 50. Form of certificate authenticating record.
- 51. Mandate to State Court on dismissal for failure to file transcript of record under Rule 10.
- 52. Mandate of the Supreme Court of the United States to State Court.
- 53. Summons and severance. (To be made a part of the record.)
- 54. Mandate on order of dismissal for failure to print transcript under Rule 10 of the U. S. Supreme Court.
- 55. Petition for certiorari.
- 56. Certificate of Court of Appeals certifying questions to the Supreme Court of U. S.
- 57. Statement of the case and questions certified to the Supreme Court of the United States.

Form No. 1

PETITION FOR APPEAL IN AN EQUITY SUIT

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of cause.

To the Hon. .... Judge of said Court.

And now comes ..... (state whether plaintiff or defendant) by ..... his attorney, and feeling himself aggrieved by the final decree of this Court entered on the .... day of ..... hereby prays that an appeal may be allowed to him from the said decree to the ..... Court (here state either the Supreme Court of the United States or the U. S. Circuit Court of Appeals for the ..... Circuit) and, in connection with this petition, petitioner herewith presents his assignment of errors.

Petitioner further prays that an order of supersedeas may be

entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

.....  
Attorney for (plaintiff or defendant).

**Form No. 2**

**ASSIGNMENT OF ERRORS**

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of cause.

Now comes the appellant ..... by ..... his attorney and in connection with his petition for appeal says that, in the record, proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The Court erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action and in denying the defendant's motion to dismiss the suit.

2. (If the assignment is made for the defendant, then use the following):

The Court erred in not holding that the separate defenses of the defendant do not state facts sufficient to constitute a defense to the action and in denying the motion of plaintiff to strike out said defense.

3. The Court erred in not holding that the counterclaim of the defendant does not state facts sufficient to constitute a defense or cause of action against the plaintiff and in denying plaintiff's motion to strike out said counter-claim.

4. The Court erred in not holding that the District Court of the United States for the ..... District of ..... has no jurisdiction as a Federal Court of the subject matter hereof,

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and in denying the defendant's motion to dismiss the suit for want of jurisdiction.

5. The Court erred in not holding that it had no jurisdiction over the person of the defendant ..... in the above entitled cause.

6. The Court erred in not holding that the plaintiff has not legal capacity to sue.

7. The Court erred in receiving the following testimony: (Here state verbatim the testimony received).

8. The Court erred in excluding the following testimony: (Here state verbatim the testimony excluded).

9. The Court erred in receiving in evidence the following documents: (Here give the documents in full).

10. The Court erred in refusing to receive in evidence the following documents. (Here give the documents in full and identify same by exhibit as received or rejected in evidence).

11. The Court erred in finding the following facts: (Here give the substance of the finding objected to).

12. The Court erred in not finding as follows as proposed by the defendant (or plaintiff): (Here describe the findings refused.)

13. The Court erred in finding the issues for the plaintiff, (or)

14. The Court erred in finding the issues for the defendant.

If the decree was entered upon the report of a Master in Chancery or Referee, then use the following:

The Court erred in approving (or rejecting) the report of the Referee (or Master in Chancery) in the above entitled cause.

15. The Court erred in decreeing (here describe the substance of the decree).

16. The decree is against the manifest weight of evidence.

17. The decree is contrary to law.

WHEREFORE, appellant prays that the decree of the ..... Court of ..... may be reversed, etc. (or with directions if directions are desired).

.....  
Attorney for Appellant.



Form No. 3

ANOTHER FORM OF ASSIGNMENT OF ERRORS IN AN EQUITY SUIT INVOLVING RES ADJUDICATA

DISTRICT COURT OF THE UNITED STATES,
..... DISTRICT OF .....
..... DIVISION.

.....
Complainant,
vs.
.....
Defendants.
No. ....
In Chancery.

ASSIGNMENT OF ERRORS BY .....
PLAINTIFF AND APPELLANT HEREIN.

And now comes the said ..... plaintiff in the above entitled cause, and, in connection with his petition for appeal, assigns the following errors.

First: The Court erred in holding that there has been a binding adjudication of the matters and things set forth in the bill of complaint herein, said finding and holding of the Court being contrary to the evidence and the law.

Second: The Court erred in sustaining the respective pleas of former adjudication filed by the several defendants herein as set forth in their answers.

Third: The Court erred in dismissing the bill of complain of this petitioner and appellant for want of equity at plaintiff's costs.

By reason whereof this appellant prays that said decree may be reversed and remanded with direction to proceed in accordance with the law.

.....
Attorney for Petitioner and Appellant

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Form No. 4

**PETITION FOR WRIT OF ERROR IN A COMMON LAW  
CIVIL ACTION**

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of Cause.

TO THE HONORABLE .....,  
JUDGE OF SAID COURT:

And now comes ..... (state whether plain-  
tiff or defendant) by ..... his attorney,  
and feeling himself aggrieved by the final judgment of this Court  
entered against him and in favor of ..... on the .....  
day of ..... hereby prays that a  
writ of error may be allowed to him from the United States Circuit  
Court of Appeals for the ..... Circuit to the District  
Court of the United States, for the ..... District of .....,  
and, in connection with this petition, petitioner herewith presents  
his assignment of errors.

Petitioner further prays that an order of supersedeas may be  
entered herein pending the final disposition of the cause and that  
the amount of security may be fixed by the order allowing the  
writ of error.

.....  
Attorney for Plaintiff in Error.

Form No. 5

**ASSIGNMENT OF ERRORS IN A COMMON LAW CIVIL  
ACTION**

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of Cause.

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And now comes the plaintiff in error by ..... his attorney, and in connection with his petition for a writ of error says that in the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The Court erred in not sustaining the demurrer of the plaintiff in error and the defendant below to the complaint (or declaration of the plaintiff below and the defendant in error herein), or

2. The Court erred in not sustaining the demurrer of the defendant to the evidence of the plaintiff made at the close of the plaintiff's case and in not directing the jury to find the issues for the defendant.

3. (If the assignment of errors is made for the plaintiff, use the following.)

The Court erred in sustaining the demurrer of the defendant to the evidence of the plaintiff and in directing the jury to find the issues for the defendant.

4. The Court erred in admitting the following evidence: (Here state verbatim the evidence admitted).

5. The Court erred in rejecting the following evidence offered by ..... (Here give the evidence offered verbatim as appears in the bill of exceptions.)

6. The Court erred in striking out the following evidence: (Here give verbatim the evidence stricken out).

7. The Court erred in charging the jury as follows: (Here give verbatim the charge made by the Court which is objected to).

8. The Court erred in not charging the jury as requested by the (plaintiff or defendant) as follows: (Here give verbatim the charges requested).

9. The Court erred in not setting aside the verdict of the jury on the ground that there is no evidence in the record upon which to sustain the verdict.

10. The Court erred in overruling the motion of the defend-

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ant to set aside the verdict and grant a new trial. (See §7, Chap. II., p. 43 of this book.)

11. The Court erred in overruling the motion of the defendant in arrest of judgment.

12. The Court erred in entering judgment upon the verdict.

13. The verdict and judgment are contrary to law.

By reason whereof, plaintiff in error prays that the judgment aforesaid may be reversed, etc.

.....  
Attorney for Plaintiff in Error.

Form No. 6

BOND ON APPEAL OR WRIT OF ERROR

KNOW ALL MEN BY THESE PRESENTS, That we, .....  
.....  
....., as principal,  
and .....  
....., as sureties,  
are held and firmly bound unto .....  
.....  
.....  
in the full and just sum of ..... dollars,  
to be paid to the said .....  
.....  
.....  
certain attorney, executors, administrators, or assigns: to which  
payment, well and truly to be made, we bind ourselves, our heirs,  
executors, and administrators, jointly and severally, by these  
presents. Sealed with our seals and dated this .....  
day of ....., in the year of our Lord one thousand nine  
hundred and .....

WHEREAS, lately at a term of the District Court of the  
(372)

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United States, for the ..... District of .....  
 in a suit depending in said Court, between .....  
 .....  
 .....  
 .....  
 .....  
 .....  
 a judgment (or decree) was rendered against the said.....  
 .....  
 for .....Dollars and costs  
 and the said .....  
 .....  
 .....  
 having obtained an appeal to (or writ of error from) the .....  
 (here describe Court to which the appeal or writ of error was  
 allowed) to reverse the judgment (or decree) in the aforesaid suit,  
 .....  
 .....

Now, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,  
 That if the said .....

.....shall prosecute  
 his appeal (or writ of error) to effect, and will pay the amount of  
 said judgment (or decree) and answer all damages and costs if he  
 (or she) fail to make his (or her) plea good, then the above obligation  
 to be void; else to remain in full force and virtue.

Sealed and delivered in presence of— }  
 ..... } ..... [SEAL]  
 ..... } ..... [SEAL]  
 ..... } ..... [SEAL]

Approved by—

.....  
 Judge.

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Form No. 7

CITATION ON APPEAL OR WRIT OF ERROR IN SUPREME COURT TO BE SIGNED BY JUDGE ALLOWING THE APPEAL OR WRIT OF ERROR.

For Citation in Court of Appeals use Form No. 22.

UNITED STATES OF AMERICA, ss:

To.....
.....
.....
.....
.....
.....

GREETING:

You are hereby cited and admonished to be and appear at a SUPREME COURT OF THE UNITED STATES, at Washington, within ..... days from the date hereof, pursuant to (an appeal) a writ of error, filed in the Clerk's Office of the ..... Court of .....

wherein .....
.....
.....
.....
.....
.....
.....

..... appellant (or plaintiff in error) and you are (appellee) defendant in error, to show cause, if any there be, why the judgment rendered against the said (appellant) plaintiff in error as in the said (appeal) writ of error mentioned,



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.....  
.....  
..... as by ..... complaint appears.  
We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the SUPREME COURT OF THE UNITED STATES, together with this writ, so that you have the same in the said Supreme Court at Washington, within ..... days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the ..... day of ....., in the year of our Lord one thousand nine hundred and .....

.....  
Clerk of the Supreme Court of the United States.

Allowed by

.....  
Associate Justice of the Supreme Court of the United States.

Form No. 9

FORM OF RETURN OF WRIT OF ERROR

..... District }  
of ..... } ss.

In obedience to the within writ, I herewith transmit to the United States Supreme Court (or Circuit Court of Appeals, for



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the ..... Circuit), a true and complete transcript of the record and proceedings in the foregoing entitled cause this ..... day of .....

(SEAL)

.....  
Clerk of the District Court of the United States, for the ..... District of .....

**Form No. 10**

**CONTEMPT**

**PETITION FOR WRIT OF ERROR AND BAIL**

(Sustained in Lewis vs. Peck, 154 Fed. 273)

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE ..... DISTRICT OF .....

Title of Cause.

To the Hon..... Judge of said Court:

Petition for Writ of Error by ..... petitioner and respondent in the above entitled cause:

Now comes, ....., the respondent in the above entitled cause, and respectfully shows that the District Court for the ..... District of ....., did on the ..... day of ....., ....., find this petitioner guilty of contempt and that judgment and sentence were pronounced by said court against him by which finding, judgment, and sentence, your petitioner was sentenced to a fine of \$. ..... or be imprisoned in the ..... jail for ..... (or until further order of said court).

And your petitioner respectfully shows that in said record, proceedings, and judgment in this cause, lately pending against your petitioner, manifest errors have intervened to the prejudice

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and injury of your petitioner, all of which appear more in detail in the assignment of errors, which is filed herewith.

Wherefore this petitioner respectfully prays that a writ of error may be allowed herein from the United States Circuit Court of Appeals for the District to the District Court of the United States, for the . . . . . Circuit, and that the record, proceedings, and judgment aforesaid may be removed from this court into the said United States Circuit Court of Appeals for the . . . . . Circuit, to the end that the same may be in and by said Court of Appeals inspected, reviewed, and considered and that the errors aforesaid may be corrected according to law, and the aforesaid judgment reversed and that the petitioner be released on bail pending this writ of error and that the amount of bail be fixed and the security offered approved, and that a citation may issue to . . . . . according to law.

.....  
Attorney for .....

**Form No. 11**

**ASSIGNMENT OF ERRORS IN CONTEMPT CASE FOR VIOLATION OF AN INJUNCTION**

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE . . . . . DISTRICT OF . . . . .

Title of Cause.

**ASSIGNMENT OF ERRORS**

And now comes the petitioner and plaintiff in error, . . . . ., and, in connection with his petition for a writ of error, says that in the record and proceedings and judgment aforesaid, and during the trial of the above entitled cause in said . . . . . Court, error has intervened to his prejudice, and this respondent here assigns the following errors, to-wit:

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First: Because the injunction, which the plaintiff in error is charged with having violated, in terms, does not prohibit the filing of the suit in a court of competent jurisdiction as complained of against petitioner and plaintiff in error and the Court erred in adjudging to the contrary.

Second: That the mere filing of the suit in the ..... Court of ..... County, in the State of ....., of itself is not such an act that would constitute a violation of said injunction or be contempt of court, as it does not interfere with nor disturb the possession of the property, and is not an act forbidden by any law or existing order, and the Court erred in holding to the contrary.

Third: That since the property in dispute was not then and is no longer in the possession of or under the control of the ..... Court of the United States, for the ..... District of ....., other courts have and had full jurisdiction and power to deal with the same and the Court erred in holding to the contrary.

Fourth: That the ..... Court of the United States cannot summarily decide the rights of the parties and it is for the state courts to decide the question of res adjudicata, if one should be raised by appropriate pleadings, and the court erred in holding to the contrary.

Fifth: That the Courts of the United States have no jurisdiction to restrain prosecution of suits in the state courts, except in suits arising under the Bankruptcy law and the court erred in holding to the contrary.

Sixth: That said ..... Court, for the reasons above stated, was without jurisdiction and also erred in entering the order committing the petitioner and plaintiff in error to the ..... jail for ..... days (or months).

Seventh: There is no competent evidence in the record upon which the court could predicate a finding of guilty against this plaintiff in error as charged in the information filed against him.

Eighth: The court erred in entering judgment against plaintiff in error.

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By reason of the errors aforesaid, the said ..... prays that the said judgment and sentence against and upon him, the said ..... may be reversed and held for naught.

.....  
Attorney for Petitioner.

For order allowing writ of error and bail, citation, etc., see Forms Nos. 14, 15, 22 and 23, and in preparing Bill of Exception follow Form No. 16. If costs were awarded, then use also Form 21.

**Form No. 12**

**PETITION FOR WRIT OF ERROR IN CRIMINAL CASE,  
FOR SUPERSEDEAS AND BAIL**

Title of cause.

To the Honorable ....., Judge of the District Court of the United States, for the ..... District of .....

And now comes ..... the defendant in the above entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the ..... District of ..... entered on the ..... day of ....., hereby petitions for an order allowing him, said defendant, to prosecute a writ of error from the United States Circuit Court of Appeals of the ..... Circuit to the District Court of the United States, for the ..... District of .....; that said writ of error may be made a supersedeas, and that your petitioner be released on bail in an amount to be fixed by the judge thereof, pending the final disposition of said writ of error. Assignment of errors is filed with this petition.

.....  
By .....  
His attorney.

Form No. 13

ASSIGNMENT OF ERRORS IN CRIMINAL CASE

Title of Cause.

ASSIGNMENT OF ERRORS

And now comes ..... the plaintiff in error and in connection with his petition for a writ of error says that in the record, proceedings, and judgment aforesaid, error has intervened to his prejudice, to wit:

First: The Honorable ..... Judge of the District Court of the United States, erred in denying the defendant's petition for a change of venue on the ground of the prejudice of said judge against the defendant.

Second: The District Court of the United States for the ..... District of ..... erred in setting aside the defendant's plea of nolo contendere heretofore entered against the objection of the defendant and in entering plea of not guilty for the defendant on motion of the Court.

Third: The Court erred in overruling the demurrer of the defendant to the indictment found against the defendant in the above entitled cause.

Fourth: The District Court of the United States for the ..... District ..... erred in sustaining the demurrer of the United States to the plea of former jeopardy of the defendant filed by him on the .. day of .....

Fifth: The Court erred in not permitting witness..... to answer the following question: (Here give question *verbatim*.)

Sixth: The Court erred over the objection and exception of the defendant in admitting the following evidence testified to by ..... which is as follows: (Here give *verbatim* objectionable evidence.)

Seventh: The Court erred in excluding the following evidence offered by ..... (Here give *verbatim* evidence excluded.)

Eighth: The Court erred in not holding that the defendant

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was and is entitled to his liberty under the Fifth Amendment to the Constitution of the United States, pleaded by him in his respective pleas.

Ninth: The Court erred in not directing the jury at the close of the Government's case to find this defendant not guilty.

Tenth: The Court erred in not directing the jury to find the defendant not guilty at the close of the whole case.

Eleventh: The Court erred in charging the jury as follows: (Here give charge *verbatim*.)

Twelfth: The Court erred in not charging the jury as requested by the defendant as follows: (Here give charge referred to.)

Thirteenth: The verdict of the jury is not supported by any competent evidence in the record.

Fourteenth: The Court erred in overruling and denying the motion of the defendant in arrest of judgment.

Fifteenth: The Court erred in entering the judgment against the defendant upon the verdict in this case.

Sixteenth: The judgment of the court is contrary to law

Wherefore said plaintiff in error prays that the said judgment of the District Court of the United States may be reversed and held for naught, etc.

.....  
Attorney for petitioner.

**Form No. 14**

**ORDER ALLOWING WRIT OF ERROR AND ADMITTING DEFENDANT TO BAIL**

Title of Cause.

Let a Writ of Error issue from the United States Circuit Court of Appeals for the ..... Circuit to the United States District Court for the ..... District of ....., as prayed for in

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the petition of the said .....; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in the cause, it is now ordered that the writ of error, allowed as above stated, operate as a supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of ..... Dollars conditioned according to law to be approved by me.

.....

Judge.

Form No. 15

BAIL BOND ON WRIT OF ERROR

KNOW ALL MEN BY THESE PRESENTS, That I, ..... of the County of ....., State of ....., as principal, and ..... of the County of ....., State of ....., as sureties, are held and firmly bound unto the United States of America in the full and just sum of ..... (\$.....) dollars, to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this ..... day of ....., in the year of our Lord, One Thousand Nine Hundred and .....

Whereas, Lately on the .... day of ..... at the ..... Term, ....., of the District Court of the United States for the ..... District of ....., ..... Division, in a cause pending in said Court, between the United States of America, Plaintiff, and ....., Defendant, a judgment and sentence was rendered against said ....., and said ..... obtained a Writ of Error from the United States Circuit Court of Appeals for the ..... Circuit (or Supreme Court of the United States) to the said United States District Court to reverse the judgment and

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sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said Court thirty days from and after the date thereof, which citation has been fully served.

Now the condition of said obligation is such, that if the said . . . . . shall appear in person in the United States Circuit Court of Appeals for the . . . . . Circuit (or Supreme Court of the United States) when said cause is reached for argument or when required by law or rule of said Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals (or Supreme Court of the United States), in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States, for the . . . . District of . . . . . Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Supreme Court, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

..... [SEAL.]  
..... [SEAL.]  
..... [SEAL.]

Approved by:  
..... Judge.  
(Date.)



Form No. 16

COMMON LAW—BILL OF EXCEPTIONS

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

UNITED STATES OF AMERICA, }  
vs. } INDICTMENT FOR .....  
..... }

BILL OF EXCEPTIONS

BE IT REMEMBERED, That the above entitled cause came on for trial on the ..... day of ....., being one of the days of the ..... Term of said Court, before the Hon. .... one of the judges of said Court, and a jury duly impanelled.

.....  
Appeared as Counsel for the  
Government.

.....  
Appeared as Counsel for the  
Defendant.

The Government to maintain its case offered the following evidence, to-wit: (Here recite the evidence which may be done in narrative form).

In the course of the examination of the witness ..... the following question was asked: (here give the question), to which question counsel for the defendant then and there duly objected upon the following ground: (here give the ground of objection); but the Court overruled the objection, to which ruling of the Court the defendant by his counsel then and there duly excepted.

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Thereupon, the Government offered in evidence the following document, to-wit: (here describe document), to which offer the defendant by his counsel then and there objected upon the following ground: (here state the ground of objection), but the objection was overruled by the Court and the document was received in evidence, to which ruling of the Court the defendant by his counsel then and there duly excepted.

At the conclusion of the Government's case, the defendant demurred to the evidence introduced by the Government and moved the Court to direct the jury to find the defendant not guilty on the ground that the Government failed to prove that the defendant committed the crime as laid in the indictment (or give other ground), but the Court overruled the motion, to which ruling of the Court the defendant by his counsel then and there duly excepted.

Thereupon, the defendant introduced the following evidence: (Here give the testimony offered for the defendant. If any exceptions were taken insert same using form as heretofore outlined).

Which was all the evidence in the case.

At the close of all the evidence, counsel for the defendant renewed the motion to direct the jury to find the defendant not guilty, but the Court again overruled the motion, to which ruling the defendant by his counsel then and there duly excepted.

Thereupon, counsel for the defendant and before the jury retired requested the Court to charge the jury as follows: (Here state the charge requested).

Thereupon, the Court charged the jury as follows: (here give the charge of the court), to which charge (or, if to part of the charge, state what part), the defendant by his counsel then and there and before the jury retired duly excepted.

The defendant also then and there and before the jury retired excepted to the ruling of the Court in failing to charge the jury as above requested by the defendant.

Whereupon the jury retired and brought in a verdict finding the defendant guilty as charged in the indictment.

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The defendant, thereupon, moved the Court to set aside the verdict and grant a new trial for the following reasons: (here give the reasons for new trial) but the Court overruled the motion, to which ruling the defendant then and there duly excepted.

The defendant, by his counsel, thereupon, moved the Court to arrest the judgment for the following reasons, to-wit: (here state reasons) but the Court overruled the motion, to which ruling of the Court the defendant by his counsel then and there duly excepted.

Thereupon, the Court entered judgment upon the verdict and sentenced the defendant to ..... years in ..... Penitentiary, and to pay a fine in the sum of..... (\$.....) Dollars, and to pay the costs of this action, to which ruling and judgment of the Court, the defendant by his counsel then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open Court this ..... day of ..... 1917.

.....

U. S. District Judge (SEAL)

**BILL OF EXCEPTIONS IN A CIVIL COMMON LAW ACTION**

Form No. 16 as near as applicable may be used in a civil suit at common law.

**Form No. 17**

**FORMS ON APPEAL IN HABEAS CORPUS MATTERS**

**DEPORTATION CASE**

**IN THE DISTRICT COURT OF THE UNITED STATES,**

..... DISTRICT OF .....

In the Matter of }  
..... }

Habeas Corpus.

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PETITION FOR APPEAL AND ADMISSION TO BAIL  
PENDING APPEAL

And now comes ..... and respectfully represents that on the ..... day of ....., a judgment was entered by this Court dismissing his petition for habeas corpus, and remanding him in custody of ..... for deportation

And your petitioner respectfully shows that in said record proceedings and judgment in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said judgment to the United States Circuit Court of Appeals for the ..... Circuit, and that said appeal may be made a *supersedeas* upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal in the said Court.

By .....  
Attorney for Petitioner.

Form No. 18

ASSIGNMENT OF ERRORS—HABEAS CORPUS CASE

IN THE DISTRICT COURT OF THE UNITED STATES,  
..... DISTRICT OF .....

In Re ..... No. ....

ASSIGNMENT OF ERRORS

And now comes ....., by ....., his attorney, and in connection with his petition for an appeal, says that in the record and proceedings, and judgment aforesaid, and during the trial of the above entitled cause in

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said District Court, error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned, and in dismissing his petition and remanding him into custody for deportation. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the 5th amendment of the Constitution of the United States.

2. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for deportation.

(Here under separate number assign further error.)

By reason whereof, this petitioner and appellant prays that said judgment may be reversed and that he be ordered discharged.

.....

Attorney for Petitioner and Appellant.

**Form No. 19**

**ORDER ALLOWING APPEAL AND RELEASING PRISONER  
ON BAIL PENDING APPEAL IN A HABEAS  
CORPUS CASE**

Title of cause.

On reading of the petition of ..... for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is herewith allowed. And it appearing to the Court that a citation was duly served as provided by law it is ordered that petitioner be admitted to bail pending the final determination of this appeal in the sum of \$..... The appeal to operate as a supersedeas. Cost bond on appeal is hereby fixed on the sum of \$ .....

.....

Judge.

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Form No. 20

SUPERSEDEAS BAIL BOND

(HABEAS CORPUS CASE)

KNOW ALL MEN BY THESE PRESENTS, That we .....  
....., as principal, and .....  
as sureties, are held and firmly bound unto the United States of  
America, in the penal sum of ..... (\$.....) dollars,  
lawful money of the United States, for the payment of which well  
and truly to be made, we bind ourselves, our heirs, administrators,  
and executors jointly, severally, and firmly.

Witness our hands and seals this 6th day of July, 1910

Whereas, the said ..... was on  
the ..... day of ....., ordered de-  
ported from the United States, by the Secretary of Commerce  
and Labor, and was taken into custody on a warrant of deporta-  
tion issued by him, and whereas the said ..... sued out a  
writ of habeas corpus in the District Court of the United States,  
for the ..... District of ....., (Cause No.  
.....), and whereas by an order of said court entered on  
..... in said court by Honorable ..... United  
States District Judge, ..... was remanded to custody  
of the respondent in said cause, and his petition was duly dis-  
missed, and whereas the said ..... prayed for  
and was allowed an appeal to the United States Circuit Court of  
Appeals for the ..... Circuit, from said judgment, and it  
was further ordered that pending such appeal to the United States  
Circuit Court of Appeals for the ..... Circuit, that he  
should be admitted to bail in the sum of .....  
(\$.....) dollars, for his appearance and surrender in the event  
said judgment is affirmed; Therefore, this obligation is such that  
if said ..... shall appear and surrender himself in open court  
before the judges of the United States District Court for the ....  
District of ....., and abide the further order of the

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court, in the event said judgment shall be affirmed, and not depart the court, then this obligation shall be null and void; otherwise to remain in full force and virtue.

In Witness whereof, the parties hereto have hereunto set their hands and seals this ..... day of ..... A. D. ....

..... (SEAL)

Approved

..... (SEAL)

....., Judge

.....

Form No. 21

APPEAL BOND FOR COSTS

(HABEAS CORPUS CASE)

KNOW ALL MEN BY THESE PRESENTS, That we, ....., as principal, and ..... as surety, are held and firmly bound unto the United States of America in the full and just sum of ..... (\$.....) Dollars, to be paid to the said United States of America certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this .... day of ..... in the year of our Lord one thousand nine hundred and .....

Whereas, lately at the .... term ....., at the District Court of the United States for the ..... District of ..... in a suit pending in said court, between ..... and the United States of America, a judgment was rendered against the said ..... dismissing his petition for habeas corpus, and remanding him into custody, and for costs, and the said ..... having obtained an appeal to the United States Circuit Court of Appeals for the ..... Circuit, to reverse the decree in the aforesaid suit.

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Now, the condition of the above obligation is such, That if the said ..... shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

..... (SEAL)

..... (SEAL)

(Date)

Approved by:

.....

Judge.

Form No. 22

CITATION

(HABEAS CORPUS CASE)

THE UNITED STATES OF AMERICA, SS:

The President of the United States to The United States of America, Greeting:

To the United States of America:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the ..... Circuit, at the city of ..... within ..... days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States in and for the ..... District of ....., and filed in the Clerk's office of said court on the ..... day of ....., in a cause wherein ..... is appelland and you appellee, to show cause if any why the decree rendered against the said appelland as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.



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Witness the Honorable ..... Judge of the District Court of the United States, in and for the ..... District of ....., this ..... day of ..... and of the Independence of the United States, the one hundred and .....

.....  
District Judge.

Attest:

....., Clerk.  
By ....., Deputy Clerk.

(SEAL)

Service of the within citation and receipt of a copy is hereby admitted this .... day of .....

.....  
U. S. Attorney,  
Attorney for Petitioner.

Form No. 23

CERTIFICATE OF DISTRICT JUDGE CERTIFYING THE QUESTION OF JURISDICTION

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

.....DIVISION.

Title of Cause:

BE IT REMEMBERED, That on the .... day of ..... this cause came on to be heard upon the motion of the defendant ..... to dismiss the said suit on the ground that the District Court of the United States for the ..... District of ..... had no jurisdiction as a Federal

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Court over the subject matter of the cause and the Court upon due consideration of said motion and after hearing the arguments of counsel sustained the same on the sole ground that this Court had no jurisdiction of the said cause as a Federal Court and accordingly directed that a decree be made and entered herein dismissing said suit for want of jurisdiction and this ruling of the Court is hereby certified to the Supreme Court of the United States.

I further certify that the matter in controversy herein, as shown by the record exceeds in value Three Thousand (\$3,000) Dollars exclusive of interest and costs.

Dated, this ..... day of .....

.....  
Judge of the United States  
District Court, for the  
..... District of .....

Form No. 24

BANKRUPTCY

ORIGINAL PETITION TO REVISE

(Drawn by the author, granted and sustained in 216 Fed. 887.)

Note: A petition to revise must be filed in U. S. Circuit Court of Appeals and not in the District Court.

PETITION TO REVISE

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE ..... CIRCUIT.

In the Matter of  
..... } In Bankruptcy.  
Bankrupt.

IN RE PETITION OF ..... FOR REVIEW.

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The Honorable Judges of the United States Circuit Court of Appeals, for the ..... Circuit.

The petition of ..... (trading under the firm name of .....), respectfully shows unto the Court:

That on the ..... day of ....., an involuntary petition in bankruptcy was filed in the District Court of the United States, for the ..... District of ....., ..... Division; against said .....; that on the ..... day of ....., said ..... was duly adjudicated to be bankrupt by the said District Court and on the ..... day of ....., said cause was referred generally to ..... Esq., Referee in Bankruptcy of said District Court; that prior to the ..... day of ....., the Honorable ..... one of the Judges of the said District Court of the United States for the ..... District of ....., conducted an investigation in said court relating to the discovery of assets of the said named bankrupt; that your petitioners, ....., and ..... were called as witnesses before said court and gave their testimony; that the said bankrupt was examined and gave his testimony; that prior to said date, to-wit: the .... day of ....., and at the time such testimony was taken, there was no issue of law or fact formed for the adjudication of the rights of your petitioners, and the investigation was conducted solely for the purpose of discovering information relating to the disposition of certain goods by the said bankrupt.

That, on the .... day of ....., ....., and subsequent to the time when the testimony of this petitioner the said bankrupt was taken at the aforesaid hearings for the discovery of assets, the ....., which is the trustee duly elected by the court and the surety of the said —————, bankrupt, filed his petition in the said District Court of the United States, setting forth that the investigation conducted in the said District Court prior to the filing of the said petition by the said trustee discloses

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that said bankrupt has, prior to the filing of the bankruptcy proceedings, turned over to your petitioners, . . . . ., certain goods amounting to . . . . ., which goods were to be paid for by the said . . . . ., to said bankrupt at the rate of . . . . . or . . . . . cents on the dollar; that said testimony heard prior to the filing of said petition discloses that said sale was a fraudulent one and a mere colorable one; that your petitioners caused the said bankrupt to issue fictitious bills of sale for which the bankrupt received no consideration; that the trustee is unable to identify said goods by reason of the fact that your petitioner have commingled said goods with their own and have obliterated all marks of identification from same. The said trustee, therefore, prayed that a decree be entered directing your petitioners to pay over to the said trustee the sum of \$. . . . . for the goods sold by the bankrupt to your petitioners. (For better certainty your petitioners refers to the said petition, a certified copy of which is attached to the transcript herewith annexed.) A rule was thereupon entered requiring your petitioners to answer said petition. To this petition, your petitioner . . . . . filed an answer representing:

That, at the outset, they did not consent to have the matters and things set forth in the said petition adjudged in a summary way, and that they did not submit themselves to the jurisdiction of said court as a court of bankruptcy for the purpose of having the merits of said petition disposed of; that they were the persons who had actual charge of the business of the firm of . . . . . and that . . . . . was not an active partner and had no personal knowledge of the matters and things set forth in the said petition.

And further, in said answer, they denied the conclusions set forth in said petition filed by said trustee as to what the testimony heard in open court tended to show, and averred that the allegations in said petition were wholly insufficient, vague, and indefinite and were purely the conclusions of the pleader; that on the contrary, these petitioners claimed that the examination conducted

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before the said district court on the various dates set forth in said petition, disclosed that these petitioners claimed that they purchased certain goods from said bankrupts in good faith on three certain occasions, and that they had paid to the bankrupts the full amount of the purchase price except . . . . ., which was paid to the bankrupts subsequent to the filing of the petition in bankruptcy; they also contended that it appeared from the examination of the bankrupts that at a prior time said bankrupts testified before the Referee in Bankruptcy as well as before the said district court substantiating the claim of your petitioners as to the purchase and sales of the goods by the bankrupts to your petitioners; that there being therefore, a bona fide dispute between the parties, these petitioners submitted that said district court had no jurisdiction as a court of bankruptcy to adjudicate the controversy raised by said petition in a summary way, but that the remedy of the said trustee was by a plenary suit either at law or in equity as provided by statute, except as to the sum of . . . . . which was paid to the bankrupts subsequent to the filing of the petition in bankruptcy, which amount these petitioners at all times were and are ready and willing to pay to the said trustee under the direction of the court.

And these petitioners further averred that the examination referred to in said petition of the trustee was one to discover assets of the bankrupts' estate; that these petitioners had been subpoenaed to appear before said district court and were duly examined as witnesses, touching upon their relations with the said bankrupts, and that in said examination they had denied all manner of conspiracy with the said bankrupts as set forth in the petition of said trustee, and said petitioners had denied that they had received from the said bankrupts goods amounting to . . . . .; that they had submitted to said district court during that examination three certain receipted bills showing the amounts of purchases and the amounts paid for same. That at said examination, none of the bankrupts were able to give an itemized statement of the goods sold by said bankrupts to your petitioners, but

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gave totals of the amounts of the sales aggregating in all the sum of . . . . .; that that amount was the supposed contract price agreed upon between the said bankrupts and your petitioners; and which the bankrupts claimed were sold to your petitioners by them at fifty or sixty cents on the dollar. That these amounts had been denied by your petitioners at said examination, and these petitioners further averred that they had been advised by their counsel that the said petition of the said trustee did not seek to avoid the sales made by the said bankrupts to the said petitioners, but was merely a demand for the recovery of the purchase price for said goods which was disputed by these petitioners, and that such controversy could not be litigated and disposed of in said district court in a summary way; that the action of the trustee in seeking by said proceeding to recover from your petitioners the sum of . . . . ., same being according to the contention of the trustee, the alleged purchase price of said goods as agreed upon between the said bankrupts and your petitioners, was in legal effect a ratification of the said sales; that the recovery of the purchase price of articles sold by the bankrupts prior to the filing of the petition in bankruptcy from third persons which is disputed, was not within the classes of cases which could be adjudicated in a summary way.

And these petitioners further averred in said answer that at no time did they have in their possession or keep any goods as custodians or agents for the said bankrupts, but that whatever goods were bought by them from the said bankrupts were for the benefit and use of themselves, and were not at any time held or agreed to be held for the benefit of the said bankrupts; that, therefore, the said district court had no jurisdiction to adjudicate the merits of said petition in a summary way.

And these petitioners further averred that the said petition was filed without authority of law and showed on its face that the said district court, as a court of bankruptcy, could take no cognizance of the matters and things set forth in said petition without the consent of your petitioners.

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..... filed a separate answer, setting forth that he has no personal knowledge of the matters and things set forth in the petition, but on information and belief, believes that the answer filed by ..... is true, and he adopted the answer so filed by ..... and also objected to the jurisdiction of the District Court. No evidence was introduced in support of said petition, but the court considered the evidence taken and heard by him prior to the filing of said petition, to-wit: on the ..... day of .....

Your petitioners, accordingly, refused to introduce any evidence in support of said answers. No replication was filed to either of said answers.

Upon said petition, answers, and the testimony taken prior to the filing of said petition (at which time there was no issue of fact or law between the parties), the said District Court entered a decree directing your petitioners, ..... to pay forthwith to said trustee in bankruptcy the sum of \$ ..... Certified copies of said answers and order of the Court are herewith attached and made part of the transcript of the record filed by these petitioners.

Your petitioners further avers that said judgment or decree of the said District Court made and entered on the ..... day of ....., was and is erroneous in matters of law in that:

(a) That the facts shown by said petition of the said trustee and the answer of your petitioners to said petition (which must be taken as true in the absence of a replication) disclose that there exists here an adversary claim between your petitioners and the said trustee, which can be litigated only by a plenary suit in a court of competent jurisdiction, and that, therefore, the said District Court of the United States had no jurisdiction to hear and determine same in a summary way against the objection of your petitioners.

(b) By said judgment or decree of said United States District Court, your petitioners were in fact deprived of due process of law,

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in violation of the Fifth Amendment to the Constitution of the United States.

(c) That under the decision of *Mueller v. Nugent*, 184 U. S. 1, said petition should have been filed in the first instance before the referee in bankruptcy to whom said cause was referred generally, whose duty it would have been to ascertain whether an adverse claim in fact exists; that the said District Court of the United States had no jurisdiction in the first instance to hear and determine said petition, inasmuch as the jurisdiction that the said District Court has in this class of cases is limited to a review of the rulings of the referee upon a proper petition for review.

(d) The said District Court of the United States for the . . . . . District of . . . . . had no authority to consider the evidence heard by said court before the said petition of said trustee was filed, because at the time of taking such testimony there was no issue between the parties. There is therefore no legal evidence that can be considered, and even the evidence heard discloses a total absence of evidence in the record as to the value of the articles sued for upon which a court could base a finding of . . . . . or for any amount.

The said District Court erred in not dismissing said petition for want of jurisdiction.

The said District Court erred in entering the said decree or judgment for the sum of . . . . . in favor of the said trustee and against these petitioners.

Wherefore, Your petitioners, feeling aggrieved because of said judgment or decree, pray that the same may be revised in matter of law by your Honorable Court as provided in paragraph 24 b of the Bankruptcy Law of 1898 and the rules and practice in such case made and provided.

.....

.....

Counsel for Petitioners.



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State of ..... }  
County of ..... } SS:  
City of .....

\_\_\_\_\_, the petitioner mentioned and described in the foregoing petition, does hereby make solemn oath that the statements of fact therein contained are true according to the best of his knowledge, information and belief.

.....  
Subscribed and sworn to before me,  
this ..... day of .....  
(SEAL) .....  
Deputy Clerk, U. S. Circuit Court  
of Appeals for the .... Circuit.

Form No. 25

ORDER GRANTING LEAVE TO FILE PETITION AND RULING RESPONDENT TO ANSWER

IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE ..... CIRCUIT.

In the Matter of  
..... }  
Bankrupt. } In Bankruptcy.

Now, on this day comes ....., petitioner, by ..... his attorney, and presents his petition to revise the judgment of the District Court of the United States for the ..... District of ....., ..... Division, entered therein on the day of .....; and It Is Now Here Ordered that said petition be filed and that the ..... Trustee in Bankruptcy answer said petition to revise within

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..... days from the service of a certified copy of this order.

(Date)..... U. S. Circuit Judge.

Form No. 26

ANSWER TO PETITION TO REVISE

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ..... CIRCUIT.

In the Matter of ..... } No. .... Bankrupt.

The answer of the ..... Trustee of said Bankrupt, to the petition of .....

Comes now ....., respondent herein, by ..... his attorney and for answer to the petition of ..... filed herein to superintend in matters of law the proceedings of the District Court, in Bankruptcy sitting, respectfully shows:

That this Honorable Court has no jurisdiction to entertain said petition and therefore this respondent prays, that the said petition be dismissed for the following reasons:

a—That no real questions of law are presented for the consideration of this Court, by the petition herein, but only questions of fact presented. This Court is bound by the findings of fact of the District Court, and may not review the conflicting evidence upon which the District Court made its conclusions of fact as set forth in the order complained of.

b—Proposition of law designated by petitioner under the denomination "b," was never presented to the District Court, hence may not be presented here upon this petition, to review and revise in matters of law.

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c—Proposition of law designated “d,” in the petition filed herein, was not presented to the District Court; all of the evidence heard by the District Court, upon which the order complained of was made, was waived without objection on the part of the petitioners herein, and hence no error may be considered upon this petition to review and revise filed herein.

d—And for other good causes appearing upon the face of the petition.

And for further answer to said petition to superintend in matters of law, the proceedings of the District Court, should this Honorable Court be of the opinion that it has jurisdiction to entertain the petition filed herein, for answer to said petition or so much as this respondent is advised it is necessary for it to answer unto, answering says:

1. This respondent admits that, on the . . . . . day of . . . . .  
. . . . ., an involuntary petition in bankruptcy was filed in the District Court of the United States, for the . . . . . District of . . . . ., . . . . . Division, against . . . . .; that, on the . . . . . day of . . . . ., the said . . . . ., was duly adjudicated bankrupt by said District Court; that, on the . . . . . day of . . . . ., said cause was referred to . . . . . Esq., Referee in Bankruptcy of said District.

2. This respondent further admits that prior to the . . . . . day of . . . . ., the Honorable . . . . ., one of the Judges of the District Court of the United States, for the . . . . . District of . . . . . conducted an investigation in said United States District Court, relative to the discovery of assets of said bankrupt; that said examination by said District Court was begun prior to the adjudication of said bankrupt and prior to the reference to said referee and was by the District Court from time to time continued in said District Court until the month of . . . . . A. D. . . . .

3. This respondent admits that the petitioner . . . . . and . . . . . witness were called as witnesses before

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said court and gave their testimony and that said bankrupt was examined and gave his testimony and that divers other witnesses were likewise examined. But this respondent denies that, at the time of the taking of said testimony, upon which the order entered by the Honorable District Court and which is sought to be reviewed was based, there were no issues of fact or of law framed for the adjudication of the rights of the petitioner herein, and this respondent charges the fact to be that, after the filing of the petition by this respondent, and the rule upon said petitioner herein to answer, and, upon the hearing upon said petition and answer, evidence was in fact received, upon which the District Court of the United States, for the . . . . . District of . . . . . entered its order being the order herein complained of.

4. This respondent admits that, on the . . . . . day of . . . . . he filed his petition in said District Court against the petitioner herein, which is the said petition upon which the order entered by the Honorable District Court, for the . . . . . District of . . . . ., was predicated, but this respondent denies that said petition was filed subsequent to the time when the testimony of said petitioner and said bankrupt was taken, upon said petition, and charges the fact to be that testimony taken upon the petition and answer, upon which the District predicates its order, was in fact taken subsequent to the filing of the petition by this respondent, and the answer of the petitioner herein, as by the order of the Honorable District Court it will appear.

5. This respondent further answering denies, that its petition against the petitioner herein, discloses an alleged state of facts as by the petition for review is therein stated, and makes said petition a part of this answer, from which said petition of this respondent herein, filed in the Honorable District Court, it will appear that the petitioner herein was charged therein with entering into a criminal conspiracy to receive goods and merchandise from the bankrupt herein; did hide and conceal the same from this respondent and creditors of the bankrupt; sell and dispose of the

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same for the benefit of said bankrupt, acting at all times as the agent of and for the bankrupt.

That the said petition set forth specifically and in detail the dates, time, and place, when and where said petitioner herein received said merchandise from said bankrupt herein, for said bankrupt and the value of same. And this respondent admits, that there was a rule entered by the Honorable District Court, for the . . . . . District of . . . . ., requiring the petitioner herein to answer the petition of this respondent, filed in said District Court, and that the petitioner herein did answer such petition, as by said answers will appear.

6. This respondent further answering admits, that in the examination of the various witnesses and the bankrupt, conducted before the Honorable District Court for the . . . . . District of . . . . ., prior to the filing of the petition by this respondent, upon which the order complained of was made, that said examination was primarily to discover assets of said bankrupt estate, it being apparent to the Honorable District Court that there had been an attempt to defraud creditors of a very large amount of money; that said petitioner herein was duly subpoenaed to appear before said District Court, during said examination and was duly examined as a witness, but that all the time when said petitioner herein was being examined, as such witness, he was represented by counsel, who in such proceedings and at such examination appeared for him; took part in such proceedings and examination, did cross-examine not only the petitioner herein but divers other witnesses and the bankrupt who appeared for such examination.

7. This respondent further answering denies, that no evidence was produced in support of the petition filed in said District Court by said respondent, upon which the order complained of was made, but charges the fact to be, that evidence was duly received by the Court, as by said order it will appear, and this respondent further answering admits, that upon the petition and answer, and upon testimony taken before the Honorable District Court of the United States, for the . . . . . District of . . . . ., a decree was entered,

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directing the petitioner herein to pay to the Trustee in bankruptcy in this case, the sum of \$. . . . ., as by the order complained of it will appear.

8. This respondent further answering states, that the order of the Honorable District Court, entered upon the petition of this respondent and upon the answer of the petitioner herein, and upon testimony taken before said District Court, is in all things correct and according to law, and that no error was committed by said District Court, and that the purported propositions of law, assigned in the petition filed herein, to superintend in matters of law the action and proceedings of the District Court, are in fact not questions of law, but questions of fact, more especially;

This respondent charges, that petitioner's purported proposition of law "a," as designated in the petition filed herein, is in fact a proposition of fact and not of law; that all issues of fact are settled by the District Court in its findings of fact and in a proceeding of this kind may not be reviewed by this Honorable Court.

9. This respondent charges, that petitioner's purported proposition of law designated "b" was never presented to or considered by the District Court, hence may not be presented for consideration here; that said proposition is not specific as required by the practice for petition to review and revise in matters of law only, and that the proceedings in the District Court were not in violation of any provision of the Constitution of the United States.

10. This respondent further answering says, that the purported proposition of law designated "c," in the petition filed herein, is supposed to be based upon the opinion in the case of *Mueller v. Nugent*, 184 U. S. 1, which decision, however, does not support the proposition of the petitioner herein. And this respondent states the fact to be that the said opinion does not support the contention that the jurisdiction of the District Court of the United States in bankruptcy matters, after a reference to a Referee, is limited to a review of the rulings of the Referee upon a petition for review.

11. This respondent further answering states, that the pur-

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ported proposition of law designated as "d," by said petitioner' is a proposition of fact and not of law and this court therefore may not consider said proposition of fact in these proceedings. Whether this be so or not, the evidence heard by the District Court, upon which it based its order complained of in these proceedings, is not reviewable by this Court in these proceedings.

And this respondent having thus answered, prays that said petition may be dismissed at the cost of said petitioner, or at least that this Honorable Court find that no error was committed in said order.

.....  
Trustee.

.....  
Attorney for Respondent.

Form No. 27

PETITION ON BEHALF OF THE GOVERNMENT FOR WRIT OF ERROR WITH ASSIGNMENT OF ERRORS

Form of Writ of Error under the Tucker Act  
See §50, p. 99 of this book.

UNITED STATES OF AMERICA  
..... District of .....  
..... Division

In the District Court Thereof. }  
..... Term, A. D. .... } ss.

THE UNITED STATES OF AMERICA, }  
vs. } Scire Facias No.....  
..... }

PETITION FOR WRIT OF ERROR.

The United States of America feeling itself aggrieved by the final judgment entered in the above entitled cause on the .....

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day of ..... by the District Court of the United States for the ..... District of ..... hereby prays that an appeal from said judgment may be allowed it to the Supreme Court of the United States, and that, upon the service of a citation, said appeal may operate as a supersedeas until the final disposition of the cause by the Supreme Court of the United States.

And in support of this petition, petitioner hereby presents its assignment of errors.

UNITED STATES OF AMERICA,  
By .....  
United States Attorney for .....  
District of .....

Form No. 28

ANOTHER FORM OF ASSIGNMENT OF ERRORS BY THE GOVERNMENT UNDER THE TUCKER ACT

UNITED STATES OF AMERICA,  
..... District of .....  
..... Division.

In the District Court Thereof,  
..... Term, A. D. 19..... } ss.

UNITED STATES OF AMERICA, }  
vs. } No.  
..... }

ASSIGNMENT OF ERRORS

The United States of America, by ..... United States Attorney for the ..... District of ..... in connection with its petition for appeal in the above entitled cause assigns the following errors as having intervened in the record,



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proceedings and judgment of the Court in the above entitled cause, to-wit:

1. The District Court erred in finding that the plaintiff . . . .  
. . . . . was entitled to recover from the United States . . . . .  
. . . . . (\$ . . . . .) Dollars. (Here assign such other errors as may appear proper.)

WHEREFORE, the said United States of America prays that the aforesaid judgment may be reversed, etc.,

.....  
United States Attorney for the  
..... District of .....

Form No. 29

PRÆCIPE FOR RECORD

Under Rule 8 of the U. S. Supreme Court and Rule . . . . . of Court of Appeals

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE . . . . . DISTRICT OF . . . . .

Title of Cause.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the . . . . . Court of the United States, by including therein the following: (Here give the papers, orders and judgment, bill of exceptions or statement of evidence desired to be included in the record).

Dated, . . . . ., . . . . . this . . . . . day of . . . . .

.....  
Attorney for Plaintiff in Error  
(or Appellant).

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Form No. 30

NOTICE OF FILING PRÆCIPE

Under Rule 8 of U. S. Supreme Court.

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of cause.

To .....

Attorney for .....

PLEASE TAKE NOTICE THAT on the ..... day of .....  
..... the undersigned filed with the Clerk of this Court a  
Præcipe for the record to be transmitted to the .....  
Court of ..... on the appeal (or writ of error) taken (or  
sued out) in the above cause, a copy of which Præcipe is herewith  
served on you.

Dated, this ..... day of ..... .....

.....

Attorney for .....

Service of the within Notice and copy of Præcipe is hereby  
accepted this ..... day of ..... .....

.....

Attorney for .....

NOTE: In the event the documents designated by the appel-  
lant or plaintiff in error are insufficient to fairly present the case  
for the appellee or defendant in error, then counsel for appellee  
or defendant in error under rule 8 of the U. S. Supreme Court  
and rules of the Court of Appeals has the privilege to designate  
other parts of the record by giving directions to that effect to the  
Clerk of the Court having charge of the preparation of the record  
and, in that event, the following form is suggested.

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Form No. 31

FORM FOR DESIGNATING OTHER PARTS OF RECORD

IN THE DISTRICT COURT OF THE UNITED STATES,  
FOR THE ..... DISTRICT OF .....

Title of cause.

TO THE CLERK OF SAID COURT:

In preparing the record on appeal (or writ of error) in the above entitled cause for transmission to the ..... Court of the United States, you are hereby requested to include the following:

(Here designate the documents omitted, orders, etc.)

Dated, this ..... day of .....

.....  
Attorney for Appellee (or  
Defendant in Error)

Form No. 32

CERTIFICATE OF THE CLERK TO THE CORRECTNESS  
OF THE RECORD AS PER PRÆCIPE

..... District of ..... }  
..... Division. } ss.

I, ..... Clerk of the District Court of the United States for the ..... District of ....., do hereby certify the above and forgoing to be a true and complete transcript of the proceedings had of record, prepared and made by me in accordance with the Præcipe filed in the cause entitled ..... vs. .... as the same appear from the original Records and Files thereof, now remaining in my custody and control.

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In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of ....., in said District, this ..... day of .....

(SEAL)

.....

Clerk.

By .....

Deputy Clerk.

Form No. 33

STIPULATION TO OMIT CERTAIN PARTS FROM PRINTED RECORD TO AVOID DUPLICATION

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE ..... CIRCUIT.

or

IN THE SUPREME COURT OF THE UNITED STATES.  
..... Term, 19 .....

Title of cause.

WHEREAS, in the transcript of the record as made up by the Clerk of the ..... Court of the United States, for the ..... District of ....., in the above entitled cause, certain documents appear to be duplicated.

WHEREFORE, it is stipulated by and between the parties hereto, through their respective counsel, that the Clerk of this Court in printing this record shall omit the following documents appearing in said record, to-wit:

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(Here enumerate the documents desired to be omitted).

Dated, this ..... day of .....

.....  
Attorney for Appellant  
(or Plaintiff in Error).

.....  
Attorney for Appellee  
(or Defendant in Error).

Form No. 34

ORDER FOR APPEARANCE

File No. ....

Supreme Court of the United States (or U. S. Circuit Court of Appeals for the ..... Circuit

No. ...., October Term, 191

.....  
.....

vs.

.....  
.....

The Clerk will enter my appearance as Counsel for the.....

(Name) .....

(P. O. Address) .....

NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

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Form No. 35

NOTICE DESIGNATING PART OF THE RECORD UNDER  
RULE 10, SUBDIVISION 9, RULE OF THE SUPREME  
COURT OF THE UNITED STATES

In the Supreme Court of the United States, at the .....  
Term, A.D. 19.....  
Gen. No. ....

Title of Cause.

Appeal from (or Error to) the ..... Court of .....

To ..... and ....., Attorneys for  
Appellant (or Defendant in Error) in above entitled cause:

We herewith serve upon the appellant (or defendant in error)  
above named by delivery to you .... copies of the statement of  
the errors upon which the appellant (or plaintiff in error) in the  
above entitled cause intends to rely and of the parts of the record  
which plaintiff in error thinks necessary for the consideration  
thereof.

Dated, ..... 19 .....

.....  
.....

Attorney for Appellant (or Plaintiff in Error.)

Service of the foregoing notice this .... day of .....  
..... is hereby acknowledged, also service of the statement  
therein referred to.

.....  
Attorney for Defendant in Error

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Form No. 36

DESIGNATING PART OF THE RECORD UNDER RULE  
10, SUBDIVISION 9 OF THE SUPREME COURT OF  
THE UNITED STATES BY APPEALANT OR PLAINTIFF  
IN ERROR

In the Supreme Court of the United States, at the .....  
Term, A. D. 19.....

Title of Cause.

Appeal from (or Error to) the ..... Court of .....

The appealant (or plaintiff in error) by .....  
Attorney presents the following statement of errors upon which  
appealant (or plaintiff in error) intends to reply in the above  
case and of the parts of the record which plaintiff in error thinks  
necessary for the consideration thereof.

(Here specify the errors in the same manner as in assignment of  
errors.)

The appealant (or plaintiff in error) also states that it con-  
sidered the following parts of the record necessary for the con-  
sideration of the errors upon which it intends to rely, to wit:  
(Here designate parts and pages of record, as follows)

Pages

229 to 231 Beginning with last question on p. 229; print to the  
end of p. 231.

568 to 581 Beginning on page 568, "....., called as a witness,"  
etc.; print to the end of the line ending "not a thing," on  
p. 581.

Respectfully submitted,

.....  
Attorneys for Appealant (or Plaintiff in Error).

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Form No. 37

DESIGNATING PART OF THE RECORD UNDER RULE 10, SUBDIVISION 9, OF THE SUPREME COURT OF THE UNITED STATES BY APPELLEE OR THE DEFENDANT IN ERROR

In the Supreme Court of the United States, at the ..... Term, A. D. 19 .....

Cal. No. .... Gen. No. ....

(Title of Cause)

Error to the ..... Court of .....

The appellee (or defendant in error), by ..... his attorneys, presents the following statement of the parts of the record herein, in addition to those parts heretofore designated by the appealant (or plaintiff in error), which he deems necessary for the consideration of the errors assigned in the above entitled cause.

(Here follow in the same order as in preceding form.)

Respectfully submitted,

..... Attorneys for Appellee (or Defendant in Error).

Form No. 38

FORM OF CERTIFICATE ON MOTION TO DOCKET AND DISMISS APPEAL UNDER RULE 9 OF SUPREME COURT UNITED STATES

DISTRICT COURT OF THE UNITED STATES, FOR THE ..... DISTRICT OF .....

I, ....., Clerk of the District Court of the United States for the ..... District of .....



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..... do hereby certify that in a certain cause pending in  
said Court, wherein .....

.....  
.....  
.....  
.....

w ..... complainant., and .....

.....  
.....  
.....  
.....  
.....  
.....  
.....

w ..... defendant ....., a final decree was rendered by said  
District Court on the ..... day of .....

....., A. D. 191 , in favor of the said .....  
....., and against the said .....  
....., and that on the ..... day of .....

....., A. D. 191 , said .....  
prayed an appeal to the Supreme Court of the United States,  
which was allowed.

In testimony whereof I hereunto subscribe  
my name and affix the seal of said Dis-  
trict Court, at .....  
this ..... day of .....  
A. D. 191...

.....  
Clerk.

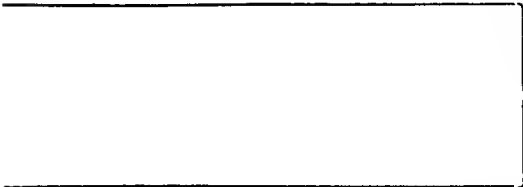
Form No. 39.

ORDER FOR MANDATE

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the ..... day of ..... one thousand nine hundred and.....

Present:

- HON. ALFRED C. COXE,
  - HON. HENRY G. WARD,
  - HON. HENRY WADE ROGERS,
  - HON. CHARLES M. HOUGH,
- Circuit Judges.



the District Court of the United States for the ..... District of.....

This cause came on to be heard on the transcript of record from the District Court of the United States, for the ..... District of ....., and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the ..... of sai District Court be and it hereby is.....

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Form No. 40

MANDATE TO CIRCUIT COURT OF APPEALS

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the.....
Court of the United States for the .....
District of .....

GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals
for the Circuit, in a cause between

as by the inspection of the transcript of the record of the said
United States Circuit Court of Appeals which was brought into
the SUPREME COURT OF THE UNITED STATES by virtue of
.....
agreeably to the act of Congress, in such case made and provided,
fully and at large appears.

AND WHEREAS, in the present term of October, in the year of
our Lord one thousand nine hundred and .....,
the said cause came on to be heard before the said SUPREME
COURT, on the said transcript of record, and was argued by
counsel:

ON CONSIDERATION WHEREOF, It is now here ordered .....
adjudged ..... by this Court that the .....
..... of the said United States Circuit Court of Ap-
peals in this cause be, and the same is hereby, .....

AND IT IS FURTHER ORDERED, That this cause be, and the
same is hereby, remanded to the ..... Court of the
United States for the ..... District of .....
You, therefore, are hereby commanded that such execution and
..... proceedings he had in said cause, .....

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..... as according to right and justice, and the laws of the United States, ought to be had, the said ..... notwithstanding.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the ..... day of ....., in the year of our Lord one thousand nine hundred and .....

Costs of .....	}	.....
Clerk .....		
Printing record.. ..		
Attorney.....		
.....		Clerk of the Supreme Court of the United States.

Form No. 41

MANDATE TO DISTRICT COURT OF U. S.

UNITED STATES OF AMERICA, SS:  
THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the .....  
Court of the United States for the .....  
District of .....

GREETING:

WHEREAS, lately in the ..... Court of the United States for the ..... District of ..... before you, or some of you, in a cause between ..... as by the inspection of the transcript of the record ..... of the said..... Court, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of ..... agreeably to the act of Congress,..... in such case made and provided, fully and at large appears.

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AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and . . . . ., the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered . . . . .  
. . . . . adjudged . . . . . by this Court that the . . . . . of the said . . . . . Court in this cause be, and the same is hereby, . . . . .  
You, therefore, are hereby commanded that such execution and . . . . . proceedings be had in said cause, . . . . .  
. . . . . as according to right and justice, and the laws of the United States, ought to be had, the said . . . . .  
. . . . . notwithstanding.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the . . . . . day of . . . . .  
. . . . . in the year of our Lord one thousand nine hundred and . . . . .

Costs of . . . . .	}	
Clerk . . . . . \$ . . . . .	}	
Printing record . . . \$ . . . . .		
Attorney . . . . . \$ . . . . .		
\$ . . . . .		

.....  
Clerk of the Supreme Court  
of the United States.



Form No. 43

PETITION FOR WRIT OF ERROR FROM U. S. SUPREME COURT TO HIGHEST COURT IN STATE

TO THE HONORABLE .....  
Chief Justice of the ..... Court of.....

And now comes ..... (here state appellant or appellee, defendant or respondent, in accordance with local practice) and represents that on the ..... day of ..... 19 —, a final judgment was duly entered by the ..... (here name the highest court of the state) affirming the ..... (judgment or decree) entered by ..... Court in a suit (at law or in equity), wherein ..... was plaintiff and ..... was defendant, and awarding costs in favor of.....

That this is an action for ..... (here give a brief statement of the cause of action and the defense as disclosed by the pleadings).

And your petitioner avers that in his said declaration (or bill of complaint or answer) he expressly charged that (here describe act of legislature or ordinance) was unconstitutional and deprived your petitioner of property without due process of law and contravened the Fourteenth Amendment to the Constitution of the United States. (Here give any other reason for the Federal claim as disclosed by the pleadings. If not raised in the pleadings, then make the following allegation:) That, at the trial of said cause, petitioner expressly made the following Federal claim (here set forth Federal claim; if based on an Act of Congress make the following allegation:) That in said suit your petitioner claimed the title, right, privilege, and immunity under (here set forth the Act of Congress); that, notwithstanding these facts, the ..... (here give the highest court of the state) decided against the title, right, privilege and immunity thus specially set up and claimed by the petitioner. And petitioner shows that the said

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judgment and decision and interpretation of said Acts of Congress were and are repugnant to the said . . . . . Constitution and laws of the United States.

(If Federal question was raised for first time by an assignment of error from the Trial Court to the Appellate Court, set forth the substance of the assignment of error so made and the decision of the court upon same, if same were considered.)

And your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors, which is filed herewith.

WHEREFORE, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the . . . . . Court (here give highest court of the state) for the correction of errors so complained of and that a transcript of record, proceedings, and papers in this cause duly authenticated by the clerk of the . . . . . Court (here give the highest court of the state) may be sent to the Supreme Court of the United States as provided by law.

Dated, . . . . . the . . . day of . . . . . 19 . . . .

. . . . .  
Attorney for . . . . .

Petitioner and Plaintiff  
in Error.

**Form No. 44**

**ASSIGNMENT OF ERRORS**

(Constitutional questions, etc.)

IN THE SUPREME COURT OF THE UNITED STATES

Title of Cause.

ERROR TO . . . . . COURT

} Assignment of  
Errors.

And now comes . . . . ., Petitioner and Plain-



tiff in Error by ..... attorneys, and in connection with his petition for a writ of error shows that, in the record and proceedings and in the rendering of the judgment and decision of the ..... Court in the above entitled cause manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

FIRST: The court erred in holding that Section ..... or an Act of the State of ..... entitled an Act "....." (or ordinance) was constitutional and did not violate the Fourteenth Amendment to the Constitution of the United States and did not deprive the plaintiff in error of the equal protection of the law.

SECOND: The said ..... Court of ..... erred in rendering decision against the title, right, privilege, and immunity set up and claimed by plaintiff in error under the Act of Congress enacted ..... and in force thence hitherto, entitled (here give title of Act, and a short description of Federal claim under the Act of Congress) and in holding that ..... (here describe the holdings of the court).

THIRD: (Here assign further error peculiar to the cast.)

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the ..... (here give highest court of the state) may be reversed, etc.

Dated, ..... the ..... day of .....

.....

Attorney for

**Form No. 45**

**ORDER ALLOWING WRIT OF ERROR**

Title of Cause.

On reading of the petition of ..... for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

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IT IS ORDERED, That a writ of error be allowed from the Supreme Court of the United States to the ..... Court of the State of ..... as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error ..... give security in the sum of ..... Dollars, that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fail to make his plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of ..... Dollars with..... as surety, it is ordered that the same be and hereby is duly approved.

IN WITNESS WHEREOF, I have hereunto set my hand this --- day of .....

.....  
Chief Justice of the ..... Court  
(highest court of the state.)

Form No. 46

BOND

KNOW ALL MEN BY THESE PRESENTS, That ..... as principal, and ..... as surety, are held and firmly bound unto ..... (here give the names of the defendants in error) in the sum of One Thousand (\$1,000.00) Dollars, to be paid to the said ..... (here give the names of the defendants in error), to which payment

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well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this . . . . day of . . . . .

..... (SEAL)

..... (SEAL)

WHEREAS, the above named plaintiffs in error (here give names of plaintiffs in error) have sued out a writ of error from the United States Supreme Court to the . . . . . Court (here give the highest court of the state), to reverse the judgment of . . . . . Court (here give the highest court of the state), rendered on the — day of . . . . . , in the suit of . . . . . vs. . . . . (here give title of the case).

NOW, THEREFORE, the condition of this obligation is such that, if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void; otherwise to remain in full force and effect.

Approved this . . . . day  
of . . . . . (SEAL)

..... (SEAL)

Chief Justice of . . . . .  
(highest court of state) . . . . . (SEAL)

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Form No. 47

CITATION

UNITED STATES OF AMERICA, SS:

To.....GREETING:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the ..... Court (here give the highest court of the state), wherein ..... is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the hand and seal of the Honorable, the Chief Justice of the ..... (here give the highest court of the state), this ..... day of ..... in the year of our Lord one thousand nine hundred and .....

..... (SEAL)  
Chief Justice of the.....  
(highest court of the state).

Attest:

(Seal ..... Court, State of .....)

.....  
Clerk ..... Court of .....

By ....., Deputy.

UNITED STATES OF AMERICA,

DISTRICT OF ....., SS:

I hereby certify that I have duly served the attached citation on the therein named ....., as attorneys of

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record for all the defendants in error, by handing to and leaving with ..... (one of the attorneys) a true copy of this writ at the offices of the said ..... at ..... (date).  
(City and State)

.....  
United States Marshal.

....., Deputy.

Fees and costs:.....

NOTE: Citation may be served by any adult person above the age of twenty-one or by the United States Marshal. When served by a private individual, the usual affidavit of service should be annexed.

Form No. 48

WRIT OF ERROR

NOTE: *Writ of error to State Court must be signed either by Clerk of U. S. Supreme Court or Clerk of the U. S. District Court and not by the Clerk of State Court.*

UNITED STATES OF AMERICA, SS:

The President of the United States of America,

To the Honorable the Justices of the Supreme Court of the State of ....., Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said ..... before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between ..... and ..... wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against (or in favor of) their validity; or wherein

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was drawn in question the validity of a statute of or an authority exercised unde rsaid State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of or Commission held or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said ..... as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the .... day of ....., in the year of our Lord one thousand nine hundred.

(SEAL)

.....  
 Clerk of the ..... Court of the United States  
 for the ..... Dist. of .....

Allowed by .....  
 Chief Justice of the ..... Court  
 of the State of .....

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Form No. 49

**CERTIFICATE OF CLERK OF THE STATE COURT  
CERTIFYING THE LODGMENT OF CERTAIN DOCUMENTS**

The plaintiff in error ..... on the .... day of ..... filed with the undersigned ..... as Clerk of the ..... Court of ..... in the above entitled action the following documents:

1st: The original bond approved by ..... on the .... day of ....., given as security for the prosecution of the writ of error in the United States Supreme Court.

2nd: The original writ of error issued by ..... of the ..... Court on the ..... day of ..... together with ..... number of copies, one for each defendant in error and one for the files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the ..... Court at my office, in the City of ..... State of ..... this ..... day of .....

(SEAL) .....  
Clerk of the ..... Court.

Form No. 50

**FORM OF CERTIFICATE AUTHENTICATING RECORD**

..... Court (highest state court)  
State of ....., ss:

I, ..... Clerk of the ..... Court of the State of ....., do hereby certify that the foregoing ..... volumes and the present volume ..... constitute a true, full, and complete transcript of the record and proceedings consisting of ..... volumes, including this present volume, to-wit:

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Volume 1 containing pages ..... to ..... inclusive.

Volume 2 containing pages ..... to ..... inclusive.

Volume 3 containing Atlas of Maps, Plats, and Charts containing pages ..... to ..... inclusive.

Volume 4 containing pages ..... to ..... inclusive of this present page (as per præcipe, if record has been so ordered) in a certain cause entitled in this court (here describe title of cause), and also the opinion of the Court rendered in said cause as the same now appears on file in my office. Original writ of error is returned with the transcript of the record.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the said ..... Court at ..... (here put in the capitol of the state) in said State, this .... day of ..... 19...

(Seal of the Court)

.....  
Clerk ..... Court of .....

Form No. 51

**MANDATE TO STATE COURT ON DISMISSAL FOR  
FAILURE TO FILE TRANSCRIPT OF RECORD  
UNDER RULE 10**

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the .....  
Court of the State of .....  
....., Greeting:

WHEREAS, lately in the ..... Court of the State of ....., before you, or some of you, in a cause between ..... as by the inspection of the transcript of the record of the said



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..... Court .....  
which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of error .....

.....  
agreeably to the act of Congress, in such case made and provided, fully and at large appears.....

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and ....., the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES, and it appearing to the Court that the parties have failed to print the transcript of the record,.....

IT IS, THEREFORE, in pursuance of the tenth rule of this Court, now here ordered and adjudged by this Court that the writ of error in this cause be, and the same is hereby dismissed ..... And the same is hereby remanded to you the said Judges of the said .....

.....  
in order that such execution and proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had there in, the said writ of error notwithstanding.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, the ..... day of ....., in the year of our Lord one thousand nine hundred and.....

Costs of ..... }  
Clerk..... \$..... }  
Attorney..... \$..... }  
\$..... }

.....  
Clerk of the Supreme Court of the United States.

Form No. 52

MANDATE OF THE SUPREME COURT OF THE UNITED STATES TO STATE COURT

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the .....
Court of the State of .....
....., Greeting:

WHEREAS, lately in the ..... Court of the State of ....., before you, or some of you, in a cause between ..... as by the inspection of the transcript of the record of the said .. Court ..... which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of error ..... agreeably to the act of Congress, ..... in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and....., the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said ..... in this cause be, and the same is hereby, ..... And the same is hereby remanded to you, the said Judges of the said ..... Court of the State of ..... in order that such execution and ..... proceedings may be had in the said

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cause, in conformity with the judgment and decree of this Court, above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, the ..... day of ....., in the year of our Lord one thousand nine hundred and .....

Costs of .....		} .....
Clerk .....	\$ .....	
Printing Record ..	\$ .....	
Attorney .....	\$ .....	
	\$ .....	

Clerk of the Supreme Court  
of the United States.

Form No. 53

SUMMONS AND SEVERANCE

(To be made part of the record. See §11, p. 35.)

Title of Cause.

To.....

You are hereby requested to join with me (if more than one person appeals then add "and the other ..... appellants") in the above entitled cause on or before the .... day of ....., to prosecute an appeal (or a writ of error) in the above entitled cause from the judgment or decree of Court (or in case of a writ of error) to be issued from the Supreme Court of the United States or the United States Circuit Court for the ..... Circuit or in case of error to State Court to ..... Court (here give the highest court of the state), to ..... Court (here give the name of the court), to reverse the judgment of the said ..... Court in the above entitled cause rendered against me and ..... (here name all the plaintiffs or

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defendants) including yourself, on the .... day of .....

You are further notified that, in case of failure on your part to join with me in said appeal (or writ of error), it will be regarded as an acquiescence on your part in the said judgment and that I shall thereupon prosecute said appeal (or writ of error) without you.

You are further notified that on the ..... day of ..... at ..... (hour) at ..... I will through my counsel present my petition for appeal (or the issuance of a writ of error) in the above entitled cause to the Honorable, (here give the name of judge to whom application will be made), at which time and place you may join with me in said petition.

Dated,....., the ..... day of .....

.....

By .....  
His attorney.

.....

Of counsel.

Attach affidavit of service.

Form No. 54

**MANDATE ON ORDER OF DISMISSAL FOR FAILURE TO  
PRINT TRANSCRIPT UNDER RULE 10 OF THE U. S.  
SUPREME COURT**

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the .....  
Court of the United States for the .....  
District of ....., Greeting:

WHEREAS, lately in the ..... Court of the  
United States for the ..... District of .....  
..... before you, or some of you, in a cause between .....

APPENDIX

as by the inspection of the transcript of the record of the said ..... Court, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of ..... agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and ....., the said cause came on to be heard before the said SUPREME COURT, and it appearing to the Court that the parties have failed to print the transcript of the record, .....

IT IS, THEREFORE, in pursuance of the tenth rule of this Court, now here ordered ..... adjudged ..... by this Court that the ..... be, and the same is hereby, dismissed ..... You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said .... notwithstanding.

WITNESS the Honorable, EDWARD D. WHITE, Chief Justice of the United States, the ..... day of ..... , in the year of our Lord one thousand nine hundred and.....

Costs of ..... }  
Clerk..... \$..... }  
Attorney..... \$..... }  
\$..... }

.....  
Clerk of the Supreme Court of  
the United States.

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Form No. 55

PETITION FOR CERTIORARI

Granted in 231 U. S. 752, 58 L. Ed 466.

IN THE  
SUPREME COURT OF THE UNITED STATES

..... Term, .....

Title of Cause.

To the Honorable, The Supreme Court of the United States:

The petition of ....., respectfully shows to the court as follows:

..... seeks in this action to recover damages against ..... for .....

This action was brought in the ..... Court of the United States for the ..... District of ..... The jurisdiction of the court was based under the statutes of the United States, and particularly under the statute entitled (here give title of Act) approved ....., Chap. ....., ..... Stat....., ..... (U. S. Comp. St. Supp. 19 ....., page ....., and amended by the Act of ....., chap. ....., ..... Stat. 291.

The trial resulted in a verdict for the plaintiff for the sum of ..... and judgment was entered on the verdict ..... (date).

The case was taken by writ of error to the Circuit Court of Appeals for the ..... Circuit, which court on ....., reversed this judgment and remanded the record to the court below with instructions to enter judgment for the defendant. The mandate went down on .....

Your petitioner is advised that the Circuit Court of Appeals was in error in ordering judgment to be entered for the defendant below, but should have directed a new trial in conformity with the

APPENDIX

rule announced in *Slocum v. New York Life Insurance Company*, 228 U. S. 364.

Your petitioner presents herewith as part of this petition a transcript of the record in the Circuit Court of Appeals.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Circuit Court of Appeals for the . . . . . Circuit, commanding said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that court, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

Your petitioner further shows that inasmuch as the facts are all before the court, justice can be done and delay and expense can be saved by entering an order modifying the judgment of the Circuit Court of Appeals by eliminating the direction to enter judgment for defendant notwithstanding the verdict, and substituting a direction for a new trial. It is submitted that the principle of law has been settled under the *Slocum* case cited above, and that there is sufficient before this court to enable it to make the order prayed for without a certiorari and sending up the record in obedience thereto.

Wherefore your petitioner prays in the alternative that an order be issued out of and under the seal of this court, directing that the action of the Circuit Court of Appeals be modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial.

.....  
By .....

APPENDIX

STATE OF ..... }  
COUNTY OF ..... } ss.:

....., being duly sworn, says that he is counsel for ..... the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Sworn to and subscribed }  
before me this .... day } .....  
of....., A. D. .... }

(SEAL).....  
Notary Public.  
Commission expires,  
.....

Form No. 56

**CERTIFICATE OF COURT OF APPEALS CERTIFYING  
QUESTIONS TO THE SUPREME COURT OF U. S.**

United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES, APPELLANT, }  
vs. } No. 4363.  
SOLOMON LOUIS GINSBERG, APPELLEE. }

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

The United States of America brought a suit in the District Court of the United States for the Western District of Missouri to cancel a certificate of citizenship issued December 18, 1912, to Solomon Louis Ginsberg, a native of Russia. The suit was



APPENDIX

brought under the provision of sec. 15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, authorizing—

“proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.”

On final hearing the trial court dismissed the bill. The Government appealed.

The grounds for cancellation averred in the bill were: (a) The certificate of citizenship was illegally procured in that there was a violation of the provision of sec. 9 of the act of June 29, 1906, “that every final hearing upon such petition (for naturalization) shall be had in open court before a judge or judges thereof,” the hearing in question having been before a judge in chambers and not in open court. (b) The certificate of citizenship was illegally procured because though the averments of Ginsberg’s petition and the verifying affidavits of his witnesses were in due form and sufficient on their face, yet the undisputed facts disclosed at the hearing of the petition showed he was not qualified to be admitted to citizenship; and the petition was also a fraud upon the law.

At the trial of the suit below there was no conflict in the evidence as to time, place, and circumstances of the hearing of the petition for naturalization nor as to Ginsberg’s qualifications for citizenship and the disclosures thereof to the judge who awarded the certificate. Sworn statements of these matters by Ginsberg and the two men who acted as his witnesses were made part of the bill of complaint, and, with the court records of which judicial notice was taken, constituted the sole evidence upon which the trial court refused to cancel the certificate and dismissed the bill. This evidence showed the following:

The petition for naturalization was heard by an United States district judge assigned for service at Kansas City in the Western District of Missouri, not the regular judge of that district. The

## APPENDIX

petition was first brought up at a night session of the court December 16, 1912, and the hearing thereof was postponed by the court with direction to Ginsberg and his witnesses to appear at the judge's chambers some time after 8 o'clock A. M., December 18, 1912. The judge's chambers were separate from but contiguous to the courtroom. According to direction they appeared at the chambers about half-past 8 o'clock in the morning, the hearing was then had, and the certificate of citizenship was awarded. As shown by the court records for the previous day court had adjourned until a later hour on the 18th than that at which the petition was heard. The petition for naturalization was filed June 7, 1912. The proofs at the hearing of it showed that Ginsberg had not resided continuously within the United States five years, nor within the State of Missouri one year, immediately preceding the date of his application, as required by sec. 4, pp. 2 and 4 of the act of January 29, 1906. Ginsberg was a native subject of Russia. He finished his school studies in England in 1890. He then went to Brazil and engaged in missionary work. In 1893 he identified himself with a foreign mission board in that country with which he served continuously thereafter. At the end of each seven years of service he was allowed a vacation of about fourteen months, and, having married in Brazil in 1893, a native of the State of Missouri, he was accustomed to spend his vacations with his wife's relatives in the latter place, following which, to use his expression, "he would return to his home in Brazil." When he declared his intention to become a citizen of the United States in 1904 it was his intention to sever his connection with the mission board and remain in this country, but the condition of his work in Brazil made it necessary for him to resume his residence there. In the five years preceding June 7, 1912, when his petition for naturalization was filed, he had been "actually and physically resident within the United States" but fifty-eight days, that is, from the 10th of the preceding April. When he filed his petition for naturalization and testified in support thereof he had no intention of claiming continuous residence in the United States, but

whenever asked he stated the facts about his actual residence in Brazil as above recited. He said the clerk of the court prepared his petition, the averments of which if true were sufficient under the law.

It is further certified that the following questions of law arise from the record and are presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them:

1—Is the final hearing of a petition for naturalization had in open court as required by sec. 9 of the act of June 29, 1906, c. 3592, if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the courtroom, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?

2—If under the above circumstances the final hearing of the petition was not in open court as required, may the certificate of citizenship issued on such a hearing and the order pursuant thereto be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured or is a fraud upon the law?

3—Is it a fraud for which a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, if the essential averments of residence in the petition for naturalization are sufficient on their face but are false in fact, the petitioner having acted in good faith and in reliance upon the officer who prepared the petition for him and having disclosed the truth at the hearing thereof?

4—May a certificate of citizenship be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for

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citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?

WILLIAM C. HOOK,  
United States Circuit Judge.  
JAS. D. ELLIOTT,  
United States Dist. Judge.  
FRANK A. YOUMANS,  
U. S. Dist. Judge

Being the judges who sat in the Circuit Court of Appeals, on the hearing of the case.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of United States of America, appellant, *vs.* Solomon Louis Ginsberg, No. 4363, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this fourth day of March, A. D. 1916:

[SEAL.]

JOHN D. JORDAN,  
Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.

Form No. 57

STATEMENT OF THE CASE AND QUESTIONS CERTIFIED  
TO THE SUPREME COURT OF THE UNITED STATES

Filed and Recorded March 31, 1915.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2309.

ALLEN BOND et al., Plaintiffs in Error,

vs.

J. L. HUME, Defendant in Error.

Error to the District Court, Western District of Texas.

Be It Remembered that this cause came on to be heard on the transcript showing the following facts:

This action was instituted in the United States Circuit Court for the Western District of Texas, at Austin, on the 23rd day of February, 1910, by Allen Bond and William J. Buttfield, plaintiffs against J. L. Hume, defendant, to recover the balance due upon an open account for money advanced to defendant, and paid, laid out and expended for his account, and for services rendered and performed for defendant at his special instance and request at divers times between the first day of July, 1907, and the first day of June, 1908, at the City, County and State of New York, in connection with the purchase and sale for defendants account of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and for the amount due upon a certain promissory note executed by defendant payable to the order of J. W. Buttfield, and by the latter assigned to the firm of Bond and Buttfield.

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The plaintiff's first amended original petition contains the following allegations:

"The plaintiffs at the special instance and request of the defendant at the City, County, and State of New York, advanced to the defendant and paid, laid out and expended for his account divers sums of money, and did and performed for said defendant at the City, County and State of New York, divers services in and about the purchase and sale of the defendant account cotton upon the New York Cotton Exchange, and in pursuance of the rules, regulations, customs and usages of the said New York Cotton Exchange, a copy of the rules and by-laws and regulations being hereto attached and marked Exhibit A, and asked to be made, etc.

"That the said services were rendered and said money paid out by them to said defendant for and at his request in buying and selling for his said account as his agent cotton for future delivery according to the rules and regulations of the New York Cotton Exchange in the City of New York, a copy of said rules and regulations being hereto attached and marked Exhibit, etc.

"Said orders for the purchase and sale of cotton for future delivery were received by plaintiffs and executed with the understanding and agreement between the parties that actual delivery for this account was contemplated, subject to the rules and by-laws of the said New York Cotton Exchange, as hereto attached and marked said Exhibit A.

"Plaintiffs allege further that they made said purchase and sales of the cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contrasts of purchase and sale for future delivery in accordance with the said rules and by-laws of the said New York Cotton Exchange, a copy of said rules and by-laws being hereto attached and marked Exhibit A, and made a part of this petition.

"Plaintiffs further allege that at the several times they made said purchases and sales for the defendant he well knew that actual delivery was contemplated, and well knew that plain-

## APPENDIX

tiffs were to make and did make said purchases and sales under and subject to the rules and by-laws of the New York Cotton Exchange, and were held personally bound for carrying out said contract, as will more fully appear by reference to said rules and by-laws hereto attached and marked Exhibit A, and plaintiffs allege that they promptly advised the defendant of the said several purchases and sales and that said purchases and sales were made in accordance and with his instruction, subject to the rules and by-laws of the New York Cotton Exchange and that said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated as provided by the by-laws and rules of said Exchange, as will more fully appear by reference to said Exhibit A.

“The by-laws of the New York Cotton Exchange pleaded by the plaintiffs contain the following provision:

“The cotton to be of any grade from Good Ordinary to Fair inclusive, and if tinged or stained not below Low Middling Stained (New York Cotton Exchange Inspection and Classification) at the price of — cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.

To this pleading the defendant, in the lower court, interposed the following exceptions:

“I. Now comes the defendant in the above entitled cause by his attorney, and excepts to plaintiffs’ petition herein and says that the same is not sufficient in law to require him to answer and should be dismissed.

“II. And for special cause of exception defendant shows the following:

1. It is apparent from the face of plaintiffs’ petition that the balance due upon the alleged account sued on, arose out of a gaming transaction in cotton futures on the New York Cotton Exchange, that none of the cotton alleged to have been bought

## APPENDIX

and sold was delivered, but the account sued on simply represents the difference in the rise and fall of the market on said Cotton Exchange, and were alleged to have been settled by plaintiffs by paying or receiving a margin or profit on each contract, as shown in said account, and that the alleged balance claimed by plaintiff to be due from defendant consists of said alleged margin or profit.

2. It appears from plaintiff's petition that said alleged account sued on arose out of transactions on the New York Cotton Exchange, and pursuant to the rules, regulations, customs and usages of said Exchange, and does not show or set forth that in the settlement or closing out of said transaction sued on by delivery or tender of any grade or grades of cotton other than the grade upon which the prices were based in the transaction sued on, that the same were settled or closed out at the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender."

Upon this record the Court below entered the following order:

"Thereupon came on to be heard the demurrers and exceptions of defendant to plaintiffs' amended petition and the same having been heard and duly considered, it is the opinion of the Court that said demurrers and exceptions should be sustained, and it is accordingly so ordered, and the plaintiffs declining to amend, it is further ordered that said cause be and the same is hereby dismissed at the cost of plaintiffs, to which order of the court sustaining said demurrers and exceptions, and dismissing said cause, the plaintiffs in open court excepted. (Rec. p. 89.)

And said cause having been argued and submitted, and the Court, for the proper decision of same, desiring the instructions of the Supreme Court of the United States, does hereby certify to the Supreme Court of the following question to wit:

"Where a contract between a citizen of the State of New York and a citizen of the State of Texas is entered into, made and executed in the State of New York for the sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and the



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same is a valid exigible contract in the State of New York, does the statute of the State of Texas (known as the 'Bucket Shop Law') passed by the 30th Legislature of the State of Texas, in 1907, the same being incorporated in the Revised Criminal Statutes of Texas (1911) as Chapter 3, pages 141, 142, or any public policy therein declared, prevent a district court of the United States, sitting in Texas, wherein a suit is brought to recover for breach of said contract from granting such relief as otherwise but for such statute the parties would be entitled to have and receive?

That the Supreme Court may be, if desired, more fully advised of the facts in the case, a printed copy of the transcript and briefs will be transmitted with this certificate, and the foregoing is ordered filed by the Clerk.

In Witness Whereof, the undersigned Judges affix their signatures, this the 30th day of March, A. D. 1915.

(Signed)

DON A. PARDEE,  
Circuit Judge.

R. W. WALKER,  
Circuit Judge.

R. M. CALL,  
District Judge.

UNITED STATES OF AMERICA,  
Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Allen Bond, et al, Plaintiffs in Error, versus J. L. Hume, Defendant in Error, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name,

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and affixed the seal of said court, at the City of New Orleans' Louisiana, this 31st day of March, A. D. 1915

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,  
Clerk of the United States Circuit Court of  
Appeals for the Fifth Circuit.

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